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Faculty of Law

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Part I: Vicarious Liability

Chapter I: The Master-Servant Relationship

PERFORMING RIGHT SOCIETY, LIMITED v. MITCHELL AND BOOKER (Palais de Danse) LIMITED. King Bench Division. [1924] 1 K.B. 762.

The plaintiffs, who were the proprietors of the sole right of performing in public certain musical works, including two known as "J'en ai marre" and "Mon Homme", alleged that... the defendants infringed their copyright in those two musical works by performing them in public in their Palais de Danse, Hammersmith, or by authorizing their performance in public without the plaintiffs' consent; and further, or in the alternative, the plaintiffs alleged that the defendants infringed the plaintiffs' copyright in those two musical pieces by permitting their Palais de Danse to be used for the said performance for their private profit without the plaintiff's consent.

McCARDIE J. The vital question is whether the defendants are responsible for the acts of the band...No programme of music was printed or announced. Clearly printed notices were put up by the defendants which were worded as follows: "To Band Conductors, Musicians, etc. Important. Only such music as may be played without fee or licence is allowed to be played in this Hall. Controlled music is strictly prohibited and the proprietor will not be responsible for any infringement." The plaintiffs, as I have said, owned a large number of copyright pieces. But outside the range of the plaintiffs ownership there was a very extensive list of dance music which could be given by the band.

I must further state that the contract with the band (with which I will deal hereafter) contained a clause that the artists should not infringe any copyright or other proprietary rights of third parties and should in the event of infringement be liable for damages and costs incurred by the infringement. . . It contained twenty-four clauses. The question was fully and ably argued before me whether under that contract the band were independent contractors or were servants of the defendants. If the band were servants, then, subject to the other points raised, the defendants are prima facie liable for the infringing performances on the principles of qui facit per alium facit per se. If the band were independent contractors, then, subject to other points raised by the plaintiffs, the defendants prima facie are not liable. . .

Now, before I deal with the first important matter, let me state one or two things which are, I conceive, plain. First, that the band themselves could have been sued for infringement of copyright. A band, however, is often a migratory thing, and an action against it only might be of small avail to the plaintiffs. Secondly, that the defendants would be clearly liable for infringement although the band were in law and in fact independent contractors if the defendants had actively directed, counselled or aided, the infringement... Thirdly, that the question whether a man be a servant or an independent contractor is often a mixed question of fact and law. If, however, the relationship rests upon a written document only, the question is primarily one of law. The contract is to be construed in the light of the relevant circumstances,

It seems convenient, ere examining the agreement with the band, to consider the tests to be applied in deciding whether a man be a servant or an independent contractor. Those words have been discussed in many cases. Definition has been difficult: see Macdonell's Master and Servant, 2nd ed., p.9. The word "servant" has been used in many aspects and in many statutes. Here we are freed from any question of the context or purpose of an Act of Parliament. The case is to be decided on general principles. The decisions are numerous and not always easy to follow. The distinction between "servant" and "independent contractor" does not seem to rest merely on the magnitude of the task undertaken. Thus, whilst a labourer employed to cleanse drains at 5s. for the job was held to be a servant and not a contractor: see Sadler v. Henlock, a plumber called in by a landlord to mend a leaky cistern was held to be an independent contractor and not a servant: see Blake v. Wolfe. A licensed drover has been held to be an independent contractor and not a servant: see Milligan v. Wedge, on the ground that he exercised an independent calling. So, too, in Rapson v. Cubitt, a gas-fitter was held to be an independent contractor. On the other hand, I conceive that a general manager, at a high salary, of a partnership, or the managing director of a limited company at an even higher salary, are usually servants and not independent contractors, and in many cases a partnership or a limited company has been held liable for their negligence or breach of duty. The word "salary" may be as applicable to a servant as the word "wages" for the use of the word "salary" is only a matter of fashion and etiquette: see per Lord Sumner in Great Western Ry. Co. v. Bater,. . . The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, all these bear on the solution of the question. But it seems clear that a more guiding test must be secured. In Macdonnell's Master and Servant, 2nd ed., p.7, a servant is defined as "one who for a consideration agrees to work subject to the orders of another". This is useful but not, I venture to think, complete. The following words from Smith's Master and Servant, 7th ed., p. 238, give point to that remark: "The employer (i.e., of an independent contractor) may nevertheless reserve to himself by contract general rights of watching the progress of the works which the contractor has agreed to carry out for him, of deciding as to the quality of materials and workmanship, of stopping the works or any part thereof at any stage, and modifying and altering them, and of dismissing disobedient or incompetent workmen employed by the contractor, and yet he will not thereby of necessity render himself liable to third persons for the negligence of the contractor in carrying out the works". . . That passage in Smith's Master and Servant shows the difficulty of decision in certain cases. It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance, of course, is only one of several to be considered, but it is usually of vital importance. The point is put well in Pollock on Torts, 12th ed., pp. 79-80: "The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A

master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, 'retains the power of controlling the work': see per Crompton J., in Sadler v. Henlock. A servant is a person subject to the command of his master as to the manner in which he shall do his work: see per Bramwell L.J. in Yewens v. Noakes, and the master is liable for his acts, neglects and defaults, to the extent to be specified. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand." The rule is stated in much the same way in Salmond's Law of Torts, 6th ed., p.96, where that able jurist says: "A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master"; and he illustrates his statement as follows: "Thus, my coachman is my servant; and if by negligent driving he runs over someone in the street, I am responsible. But the cabman whom I engage for a particular journey is not my servant; he is not under my orders; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place; if an accident happens by his negligence he is responsible, and not I." I need not here mention the cases quoted by the author on the points he is dealing with. So, in like fashion also is the matter dealt with in Clerk and Lindsell on Torts, 7th ed., pp. 65-66, where it is added: "Those agents of the former class whose employment is more or less continuous are usually styled servants, whilse those whose employment is intermittent or confined to a particular occasion, are usually called by the generic name of agents. Between servants, however, and other agents over whom the employer reserves control, there is no distinction in point of law; the employer is liable for the torts of the one to the same extent and subject to the same conditions as he is liable for the torts of the other." I need only refer to the words of Bowen, L.J. in Donovan v. Laing, Wharton, and Down Construction Syndicate. They are these: "By the employer is meant the person who has a right at the moment to control the doing of the act." This judgment of Bowen, L.J. was approved by the Privy Council in Bain v. Central Vermont Ry. Co. It is not without interest to observe that much the same rule prevails in criminal as in civil law, and many of the decisions are instructive. I need only make reference to Archbold's Criminal Pleading, 26th ed., pp. 601, 612, and to the judgment of Blackburn J. in Reg. v. Negus, where he says: "The test is very much this, viz., whether the person charged (that is, a clerk or servant) is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to the service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control.

Bearing these matters in mind, I briefly summarize the agreement...with the band...In my humble opinion it is an agreement which made the band the servants of the defendants. It provides for seven hours' daily service. It uses the word "services". It mentions "salary". It mentions "Pay". It uses the word "employ". It provides for a period of employment. It provides that the band shall play at any place in London where the defendants may direct. It provides that their services shall be at the exclusive disposal of the defendants. It gives the defendants the right of immediate dismissal for the breach of any reasonable instructions or requirements. Above all it gives, I think, to the defendants the right of continuous, dominant, and detailed control on every point, including the nature of the music to be played. In my opinion this is not a case of an independent contractor agreement with some features of a service agreement; it is a case rather of a service agreement with several peculiar features appropriate to the employment of a band. I think that just as the defendants would be prima facie liable

for the negligence of the band causing physical injury to third persons, so they are prima facie liable for infringement by the band of copyright. The principle of respondeat superior is far-reaching. I may add that the case of a great singer or a great violinist who gives one or more isolated performances may often present contractual arrangements quite different from those now before me.

In view of the ruling I have just given I must consider the next point taken in the able arguments...for the defendants. They submitted that, even if the band were servants of the defendants, yet that, in view of the prohibition of infringement, both in cl.4 of the agreement and in the public notice, the defendants could not be fixed with liability. In substance this raises the question whether the principle of Limpus v. London General Omnibus Co. applies in favour of the present plaintiffs. There the defendants' driver, contrary to express instructions not to race with or obstruct other omnibuses, had upset the plaintiff's omnibus by pulling across the road in front of it. It was held that the defendants were liable, for the servant was acting in the course of his employment. I cannot doubt that in the present case the band were acting in the course of their employment and for the defendants' benefit, for they were engaged for the very purpose of playing dance music at the defendants' hall. I am satisfied, moreover, that they did not infringe copyright knowingly or wilfully; as to which see Pollock on Torts, 12th ed., p.94. The plaintiffs' inspector spoke to Mr. Syd Roy after the two pieces had been performed. This was the conversation: The inspector said: "You know that you have played 'J'en ai marre' and 'Mon Homme'?" Mr. Syd Roy replied "Yes". The inspector then said: "You ought not to have done so, as they belong to the Performing Right Society". Mr. Roy replied, "I did not know that", and he added: "I am not quite sure what works belong to the Society and we are hampered by the defendants not holding a license." This is not a case of wilful misconduct by the band for their own purposes, and it seems clear, therefore, that the case of Joseph Band, Ltd. v. Craig, cited by Mr. Grant, has no application here... It follows from what I have ventured to say that the points raised by the defendants fail.

Judgment for the plaintiffs.

[In Federal Cmsr. of Taxation v. Thompson (1944), 69 C.L.R. 227, a radio artist engaged for one performance of a Lux Radio play, under a contract which provided for a fee for the final performance, but no fees for rehearsals, but which obliged the artist to attend rehearsals, was held to be a "servant". The production of radio plays involved "a most detailed and extensive control of the artists during both rehearsals and the final performance."]

EGGINTON v. READER. King's Bench Division. [1936] 1 All E.R.7.

[The plaintiff brought action against the driver of a motor car for injuries caused by the driver's negligence. The driver was insured against third party risks but before trial the insurance company failed. The plaintiffs then added as defendant, B. & A. Gowns Ltd., the company for whom the driver acted as salesman on commission. Negligence of the driver was established at the trial.]

LEWIS J. .... The plaintiffs have to satisfy me that Reader, when he was guilty of the negligence, was acting as the servant of B. & A. Gowns Ltd. so as to make them liable for his acts.

Now, the facts as to the relationship between Reader and B. & A. Gowns Ltd. are that Reader was working on commission to sell the products of B. & A. Gowns Ltd. He was paid a commission of 6 per cent. on all sales affected by him, and, as he had a car os his own, he was given an allowance of £1 per week for the upkeep of that car. At the time of the accident he had with him samples of B. & A. Gowns Ltd. and he was calling at a house where he hoped to find someone from whom he could obtain an order and so get commission. The terms on which he was employed are set out in the answers to interrogatories sworn by B. & A. Gowns Ltd., which answers were put in by the plaintiffs' counsel, and they are as follows. The defendants B. & A. Gowns Ltd. were asked: "Was not the defendant Reader at the time of the matters complained of in the statement of claim employed by the defendant company in some and what capacity? If yea, what were the terms of the said employment? Were they in writing or were they verbal? If in writing, identify the document or documents. If verbal, state the substance of the said terms." The second interrogatory was; "Was it not part of the duties of the said Reader to travel from place to place on behalf of the defendant company? If yea, was it not a term of the said employment that the said Reader should drive his motor car for the said travelling? And was he not engaged in so doing at the time of the collision complained of?"

The answers by B. & A. Gowns Ltd. to those two interrogatories were as follows; "At the date of the matters complained of in the statement of claim the defendant Reader was acting as an agent for the sale of the goods of the defendant company, B. & A. Gowns Ltd. He was entrusted each morning with samples of stock, which he had to return or account for at the end of each day, and he called on his customers during the day with a view to booking orders for the goods of his said co-defendants. The said defendant Reader visited such places as he thought fit in his search for orders as aforesaid, and was not subject to any orders or directions from the defendant company either as to the districts or the persons, firms or companies he should visit, neither was he prohibited from acting as agent for or seeking orders for goods of other person, firms or companies. The said defendant Reader received as remuneration from the defendant company a commission of 6 per centum on the value of the goods of the defendant company sold by him, and in addition he was paid £1 per week towards the cost of his petrol. The agreement under which the defendant Reader acted as aforesaid was made orally on Oct.8,1934." The second answer was; "It was part of the duties of the said defendant Reader to travel to such places as he thought fit to sell goods on behalf of the defendant company. It was known at the time that the agreement of Oct.8, 1934, was made that the defendant Reader owned a motor car and proposed to use it in his travels, but it was not a term of the said agreement that the said defendant should use the said or any motor car. The defendant company do not know whether the defendant Reader was engaged in travelling on their behalf at the time of the collision complained of."

That account of the terms upon which Reader (to use a neutral expression) was employed was corroborated by the witness Reader in the witness-box. It was supplemented by him, because he stated that not only was he at liberty to call on anyone he liked, but that he was at liberty to refuse to call on any person that B. & A. Gowns Ltd. might tell him to call upon; in fact, he was his own master, and could work

when, how, and where he liked, and that B. & G. Gowns Ltd. had no control over him in the manner in which he obtained orders. Indeed, if he so wished he need not work at all, though if he had not done so he would have effected no sales, and B. & A. Gowns Ltd. would immediately have terminated any arrangement as to the upkeep of his car. In those circumstances, was he the agent or servant of B. & A. Gowns Ltd.?

This is not a case of deciding whose servant he was, which is the problem which has been presented very frequently to the courts, and is to be found in a great many reported cases... The question, to my mind, in this case is whether or not Reader was the servant or agent of B. & A. Gowns Ltd. at all, or at least to such an extent as to make B. & A. Gowns Ltd. responsible for his negligent acts. I have come to the conclusion that he was not. The tests of deciding whether a person is a servant or not are set out in a judgment of the late McCardie J., in the case of Performing Right Society, Ltd. v. Mitchell and Booker (Palais de Danse), Ltd.....

Taking those tests which the learned Judge applied to the particular agreement before him, I cannot find that a single one of those tests is satisfied in this particular case. Indeed, none of those elements which were present in that case seems to be present in this. I therefore find (and I do so with some regret, in view of the fact that I understand a judgment against the first defendant will not be worth very much) that B. & A. Gowns Ltd. were not the employers of the defendant Reader in such a sense as to entitle the plaintiffs to recover from them damages in respect of the negligence of Reader.

[See Leidy, Salesmen as Independent Contractors (1930), 28 Mich. L. R. 365.

In Stockwell v. Morris (1933), 22 P.(2d) 189 (Wyo.), plaintiff was injured by the negligent driving of a salesman for a company that manufactured washing machines. The salesman had no other occupation and had worked for the company some years. He had assigned to him a certain part of a state as his territory and in that territory he appointed and discharged subsalesmen under him. He received a commission on sales made by him and his subsalesmen but no further compensation from the company. On the day of the accident the salesman, driving his own car drove to advise one of the salesmen under him, and at the latter's suggestion then went to the home of a woman to whom a washing machine had been sold and made repairs to her machine. Repairs were ordinarily made by a special representative of the company. Driving away from the customer's house the collision occurred. The court (citing and discussing the Restatement) held the company not liable. "...The agent has the sole power of control of his automobile. He, as owner, can distribute the risk of driving it by taking out insurance better than, or at least as well as, his principal. If he alone is held responsible for his negligence, that has a tendency to cause him to exercise care to prevent accidents".

In Henkelmann v. Metropolitan Life Ins. Co. (1942), 26 Atl.(2d) 418 (Md.), an employee of an insurance company selling insurance and collecting premiums in an assigned territory was paid by salary and commission and drove his own car. It was held that the "agent was an independent contractor in respect to the operation of the car". Bond C.J. (dissenting) held that the employee was a servant and held that the rule in Restatement of Agency, s.239 governed: "If the master directs a servant to accomplish the result and does not specify the means to be used, the servant is authorized to employ any usual or suitable means." The illustration of the Restatement is that of a messenger boy given no instructions as to means of locomotion. The boy's use of his own bicycle in delivering a message is stated to be within the scope of his employment.]

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED v. PRODUCERS AND CITIZENS COOPERATIVE ASSURANCE CO. OF AUSTRALIA LIMITED. High Court of Australia. 1931. 46 C.L.R. 41.

Defendant assurance company made an agreement with Ridley under which the latter agreed to canvass business as an agent for defendant. The agreement provided that "the agent will not in any circumstances whatsoever use language or write anything respecting any person or institution which may have the effect of reflecting upon the character, integrity or conduct of such person or institution, or which may tend to bring the same into disrepute or discredit." While soliciting business for defendant, Ridley made defamatory remarks concerning the plaintiff. Plaintiff brought an action for slander against defendant and obtained a judgment at the trial. Defendant appealed.

DIXON J. ...The slanders were uttered in the course of attempting to induce persons who had insured with the respondent to make proposals for life insurance with the appellant on occasions when the "agent" interviewed these persons "during", as the appellant's admission runs, "the course of carrying out the terms of" his written agreement with the appellant. In the written agreement he is called "the agent", and the appellant Company agrees to pay to him on proposals, bearing his signature as introducing agent, commission at specified rates in respect of completed and accepted business. His duties are not defined, but the agreement expressly allows him to perform them either by his clerks and servants or personally. It provides that he may engage in any other business or occupation during the continuance of the agency, except that he may not directly or indirectly act for any other life or accident insurance company. It contemplates the receipt by him of moneys on behalf of the appellant, and stipulates for prompt payment over and a statement of the receipts. It expressly prohibits him from using language which may reflect upon the character or conduct of any person or institution, or tend to bring it into disrepute or discredit.

Little evidence was given of the relations which in fact subsisted between him and the appellant in the actual conduct of his agency; and, I think, no sufficient reason appears for supposing that the appellant assumed such a control over the manner in which he executed his work as to constitute him its servant. In my opinion, the liability of a master for the torts committed by his servant in the course of his employment is not imposed upon the appellant by the agency agreement, but I do not think that it follows that the appellant incurs no responsibility for the defamation published by the "agent" in the course of his attempts to obtain proposals.

In most cases in which a tort is committed in the course of the performance of work for the benefit of another person, he cannot be vicariously responsible if the actual tortfeasor is not his servant and he has not directly authorized the doing of the act which amounts to a tort. The work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal. But a difficulty arises when the function entrusted is that of representing the person who requests its performance in a transaction with others,

so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity. In this very case the "agent" has authority to obtain proposals for and on behalf of the appellant; and he has, I have no doubt, authority to accept premiums. When a proposal is made and a premium paid to him, the Company then and there receives them, because it has put him in its place for the purpose. This does not mean that he may conclude a contract of insurance which binds the Company. It may be, and probably is, outside his province to go beyond soliciting and obtaining proposals and receiving premiums; but I think that in performing these services for the Company, he does not act independently, but as a representative of the Company, which accordingly must be considered as itself conducting the negotiation in his person. The rule which imposes liability upon a master for the wrongs of his servant committed in the course of his employment is commonly regarded as part of the law of agency; indeed, in our case-law the terms principal and agent are employed more often than not although the matter in hand arises upon the relation of master and servant. But there is, I believe, no case which distinctly decides that a principal is liable generally for wrongful acts which he did not directly authorize, committed in the course of carrying out his agency by an agent who is not the principal's servant or partner, except, perhaps, in some special relations, such as solicitor and client, and then within limitations. . .

If the view be right which I have already expressed, that the "agent" represented the Company in soliciting proposals so that he was acting in right of the Company with its authority, it follows that the Company in confiding to his judgment, within the limits of relevance and of reasonableness, the choice of inducements and arguments, authorized him on its behalf to address to prospective proponents such observations as appeared to him appropriate. The undertaking contained in his contract not to disparage other institutions is not a limitation of his authority but a promise as to the manner of its exercise. In these circumstances, I do not think it is any extension of principle to hold the Company liable for the slanders which he thought proper to include in his apparatus of persuasion.

The wrong committed arose from the mistaken or erroneous manner in which the actual authority committed to him was exercised when acting as a true agent representing his principal in dealing with third persons.

I do not think a distinction can be maintained between breaches of duty towards third persons with whom the agent is authorized to deal and breaches of duty towards strangers, committed in exercising that authority. If what he does is done as the representative of his principal, it cannot matter, apart from questions of estoppel and of apparent as opposed to real authority, whether the injury which it inflicts is a wrong to one rather than another person.

The appeal should be dismissed.

[Gavan Duffy C.J., Rich and Starke JJ. supported the dismissal of the appeal. Evatt and McTiernan JJ. dissented. Per Evatt J.: "Either [Ridley] was pursuing his own agency business or he was acting outside any authority conferred upon him by defendant."]

T. G. BRIGHT & COMPANY LTD. v. KERR. Supreme Court of Canada. [1939] S.C.R. 63, on appeal from the Court of Appeal for Ontario, [1937] O.R. 205.

[John Todd Kerr, a pedestrian, was struck by a motorcycle owned by defendant Leslie Sinclair and operated by defendant Wilbert Sinclair. The accident resulted in his death and the plaintiff, his widow, brought action on behalf of herself and her children against the two Sinclairs and the defendant T. G. Bright & Co. Ltd. The two Sinclairs did not appear or defend the action and as the onus was on them to disprove negligence and as there was nothing to indicate there was no negligence on the part of Wilbert Sinclair judgment was entered against the Sinclairs for $12,000.

T. G. Bright and Co. Ltd. is licensed to sell native wine pursuant to The Liquor Control Act, R.S.O. 1927, c. 257, and carry on the business of licensed wine merchants pursuant to s. 94 of that Act on premises in the City of Toronto. Under this Act certain Regulations have been passed and approved by the Lieutenant-Governor in Council. By Regulations 55 et seq. beer may not be delivered to a purchaser save at his residence "by a common carrier, a brewer or brewer's agent". "Brewer" and "brewer's agent" are interpreted to cover a vendor of wine and his agent. Bright, not desiring to make delivery itself, entered into an arrangement with Wilbert Sinclair to deliver parcels containing wine to the customers of the firm, for which service he was to be paid a stipulated amount upon each parcel. For this sum Sinclair was not only to make delivery at the address of the customer, but was to collect the price to be paid and to take a receipt. He was thereafter to turn over to Bright the money collected and to return to its control the receipt taken. In practice a delivery book was installed showing where the parcels were to be delivered and the amount, if any, to be collected and the receipts. It was while delivering a parcel of goods entrusted to him that Sinclair met with the unfortunate accident giving rise to this action.

The trial judge dismissed the action against T. G. Bright & Co. Ltd. upon a motion for non-suit. The plaintiff appealed to the Court of Appeal for Ontario against such dismissal and asked for a new trial.]

ROWELL C.J.O. For the plaintiff it was argued that, in view of the Regulations, the defendant Wilbert Sinclair must be found to have been the agent of the defendant company. The Regulations require delivery to be made either by common carrier, or by a brewer or brewer's agent (native wine manufacturer or his agent); admittedly Sinclair was not a common carrier within the meaning of the Regulations, nor a native wine manufacturer; consequently he must have been the manufacturer's agent...An examination of The Liquor Control Act, R.S.O. 1927, c. 257, and Regulations would indicate that the object of the Regulation was to ensure that in the transport of the wine from the manufacturer to purchaser it should be in the custody of those who could be trusted to see that it would not be disposed of contrary to the law, namely, a common carrier approved by The Liquor Control Board, the manufacturer himself or his agent, for whose transport to the purchaser the manufacturer would be responsible. It is, of course, conceivable that the manufacturer might entrust the delivery of the wine to some one other than his agent or a common carrier approved by the Board, but in such case he would subject himself to prosecution for violation of the Regulations.

If the defendant company had been prosecuted can anyone doubt that its defence--and it would have been a complete defence--would have been that Sinclair was its agent for the delivery of the wine to the purchasers. Likewise, if Sinclair had been prosecuted for having wine in his possession on the highway, contrary to the Regulations, his answer--and a complete answer--would have been the same, namely, that he was the agent for the defendant company delivering the wine to the purchasers.

The question of civil liability to the plaintiff in this action cannot be determined by the provisions of the Act and Regulations alone. It must depend on the capacity in which Sinclair was employed and one must not only look at the Regulations, but at the evidence also.

According to the evidence, the procedure adopted by the defendant company was as follows: an order was received by telephone and the name of the purchaser, his address and the quantity of wine required was entered upon the order form by Johnston or the clerk in the office who received the order. The order was then filled and ready for delivery. All deliveries up to four o'clock in the afternoon were made by Eddy's Delivery Service, but they made their last call at four o'clock, and orders received after that hour were delivered by the defendant Wilbert Sinclair, who called for the parcels or cartons at six or half past six o'clock in the evening. It was his duty, before delivering the wine to the purchaser, to secure the purchaser's signature to the original order, which must be forwarded by the company to the Liquor Control Board. He must also secure payment of the purchase price and a receipt for the wine on delivery. He could not deliver the wine without securing the signature to the original order, or without payment of the purchase price, and delivery had to be made within the time prescribed by the Regulations. If the residence of the purchaser was an apartment-house, boarding house or rooming house or hotel, he must hunt out the purchaser and make delivery directly to him. If any difficulty arose in making delivery in accordance with his instructions, it was his duty to telephone to Mr. Johnston and receive special instructions and to act on those instructions. He was required to return to the company the following day the original order for purchase duly signed and the purchase price. Having regard to the time within which delivery must be made to comply with the Regulations, it could only be made by motorcycle or motor car, and it appears quite clear from the evidence that Johnston knew and approved of the use of the motorcycle for delivery of the wine. Sinclair was paid twenty-five cents a carton for deliveries within the city limits and thirty-five cents outside the city, the payments being made weekly.

After a careful perusal of the evidence, I am of the opinion that there was evidence upon which a jury might find the following facts: (1) that the defendant company employed the defendant Wilbert Sinclair as its agent to complete the sale of its wine to certain customers by securing their signatures to the order forms, by collecting the purchase price and then delivering the wine covered by the orders to the purchasers; (2) that as such agent he was under the general supervision and control of the defendant company in that he was required to make the deliveries between certain hours, that he must secure the signature of the receiver at the residence where the wine was delivered and payment of the purchase price before he could make delivery, that if he delivered at a hotel or boarding-house, the person taking delivery must be the purchaser, and he must find the purchaser and make delivery to the purchaser. If he found any difficulty in making delivery and desired instructions as to what he should do, his duty was to telephone the office of the defendant company and obtain instructions and to act on

such instructions. He was to make return of the moneys collected and the order forms duly signed on the following day, and he was to be paid weekly on the basis of twenty-five cents for each delivery within the City of Toronto and thirty-five cents for each delivery outside the city limits; (3) that the agreed method for making deliveries was by motorcycle; (4) that on the night of the 20th March last, while acting in the course of his employment as agent, and making delivery of wine to certain customers, he negligently caused the injury to the late John Todd Kerr which resulted in his death.

That a jury might find that the tort was committed in the course of his employment as agent appears clear. It was committed while he was engaged in doing the very work he was employed to do, namely, delivering the wine, and by the very method of conveyance which a jury might find it was agreed should be used.

Counsel for the plaintiff contended that if these facts had been found by the jury, she would have been entitled to have judgment entered against the defendant company, and that she should now be granted a new trial in order that these matters might be submitted to the jury for determination.

Counsel for the defendant company, while contending that a jury should not, upon the evidence, reach the conclusions above set out, further contends that such findings would not establish that the relation of master and servant existed between the defendant company and Wilbert Sinclair, and that in the absence of such relationship there could be no liability on the part of the defendant company; that Sinclair was an independent contractor...

The plaintiff, on the other hand, contends that failure to establish the relation of master and servant does not disentitle her to recover, but that if she established the relation of principal and agent, she is entitled to recover against the defendant company by reason of the negligence of the agent in the course of his employment...

The law as stated in Salmond on Torts, to which I shall refer more fully later, would appear to support the defendant company's contention that there is no liability unless the relation of master and servant is established; otherwise a person employed is an independent contractor. On the other hand the law as stated by Halsbury and Bowstead on Agency would appear to support the plaintiff's contention that if the relation of principal and agent is established, the defendant company would be liable for the tort of its agent committed in the course of his employment. In Halsbury the distinction is drawn on the one hand between an agent and a servant and on the other between an agent and an independent contractor, and this appears to me to be a sound distinction. Halsbury, 2nd ed., vol.1, p.193:

"An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference, and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise

his authority, in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such, is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."

And at p. 285: "Where the act complained of is not expressly authorised by the principal, the principal is, jointly and severally with the agent, responsible if such act is committed by the agent in the course of his employment as agent or within the ostensible scope of his authority as measured by reference to his ordinary duties however improper or imperfect the manner in which the authority is carried out."

The same principle is laid down in Bowstead on Agency, 8th ed., p. 340: "Where loss or injury is caused to any third person by any wrongful act or omission of an agent while acting or purporting to act on behalf of the principal, either in the ordinary course of his employment, or with the authority of the principal, the principal is liable therefor jointly and severally with the agent."

Some very interesting illustrations of this principle are given in Bowstead, among others, Morris v. Salberg (1889), 22 Q.B.D. 614. In this case a solicitor, by an endorsement on the back of a writ of execution directing the sheriff to levy the goods and chattels of a judgment debtor, misled the sheriff by giving the address of the debtor's father, and the father's goods and chattels were wrongfully seized by the sheriff. It was held that the client was liable for the wrongful seizure, it being part of the solicitor's duty in the ordinary course of his employment to endorse the writ. It cannot be said that the relation of master and servant exists between the client and his solicitor; it is clearly a case of principal and agent.

In Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317, Lord Selborne, after referring to certain cases which establish the liability of the principal for the fraud of his agent, at p. 326, says: "It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded,not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in Barwick's Case, L.R. 2 Ex. (Ch.) 259), 'with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.'"

It surely cannot be successfully contended that a principal is only liable for the fraud of his agent where the relation of master and servant exists, and, as Lord Selborne says, "no sensible distinction can be drawn between the case of fraud and the case of any other wrong".....

The case of Duffield v. Peers (1916), 37 O.L.R.652 (a decision of this Court composed of Meredith C.J.C.P., Magee and Hodgins JJ.A. and Lennox J.) appears to be very much in point. In this case the plaintiff brought action for damages for injury sustained by being thrown down by a horse driven by the defendant Peers, in a city highway, where the plaintiff was attempting to cross on foot, by reason of

the negligence of the defendant, Peers, who was employed by the defendant company as an agent selling scales on commission. The jury found in favour of the plaintiff and awarded $2,500. damages. From this judgment an appeal was taken to this Court. Counsel for the appellant contended that, under the circumstances, the plaintiff should have been non-suited, as the evidence showed that the appellants were not masters nor was Peers a servant in such a sense as would make the former liable for the tort of the latter; that Peers was an agent selling scales on commission, and the horse used by him was not the property of the company. It would appear from the report of the case that counsel for the respondent did not contend that the relation of master and servant existed between the appellants, but that Peers was an agent of the appellant company using the horse partly for his own benefit and partly for theirs, and he cited Halsbury's Laws of England where the principle is stated as applying alike to the relation of master and servant and that of principal and agent. The judgment of the Court was delivered by Meredith C.J.C.P. in the course of which he said, at p. 655:

"It may be that they could not have commanded him to go upon the business he was then about, or to be where he was when the accident happened; but, being there upon their business, even if at the same time in his own interests and at his own choice there was evidence upon which it could be found that his acts in and about that business were, as to third persons affected, their acts, and none the less so because he paid hire for the horse and conveyance; if they were his own, and he was to provide them, as well as his own services, in his employment, that would not necessarily exclude him from being in the service, and acting in the place, of his employers. There was also some evidence upon which reasonable men could find that, in using the horse and conveyance generally, he was acting under the directions of his employers, and that it was part of his duty to them, under such directions, to return the horse and conveyance to the stables, as he was doing when the accident happened."

From the facts appearing in the judgment it is clear that the ratio decidendi of this case is not that the relation of master and servant existed between the apellant company and Peers, but that the relation of principal and agent existed, and that the principal was liable for the tort of the agent committed in the course of his employment.

Another case relied on by the appellant is Katz v. Consolidated Motors Ltd. & Thomson, [1930] 2 D.L.R. 241, [1930] 1 W.W.R. 305, a decision of the Court of Appeal of British Columbia. The headnote is: "Where a company which buys and sells automobiles, permits a person to take out cars for demonstration purposes and pays him a commission on cars sold by him, the relationship of principal and agent exists, and the company will be liable for the person's negligence in the course of his employment." Macdonald J.A., at pp. 247 and 248, after referring to Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317, at p. 326 and Reg. v. Walker (1858), 27 L.J.M.C. at pp. 207 and 208, says, referring to Thomson:

"He is its agent to sell cars. That is the principal's business. Thomson was doing it for them. All acts done for purposes of sale are in the course of that agency and for the principal's benefit. Bramwell, B. in Reg. v. Walker (1858), 27 L.J.M.C. 207, at p. 208, in referring to the distinction between principal and agent and master and servant, said: 'It seems to me that the difference between

the relations of master and servant and of principal and agent is this: A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done'. There is a difference in 'status' between a servant and an agent. We have no finding as to the former relationship but the evidence discloses the relationship of principal and agent and the finding is attributable to it. That being so the principal is liable for the negligence of its agent in the course of his employment, although the principal did not necessarily direct it and appellant company is liable for the negligence, if any, of Thomson".

I now come to the principles laid down in Salmond's Law of Torts, 9th ed., p. 89, where the learned author points out that if the term "agent" is used to mean any person employed to do work for another, then agents are of two classes, "distinguishable as (1) servants, (2) independent contractors. It is for the first kind of agent only that the employer is responsible under the rule which we have been considering. When the agent is an independent contractor, his employer is not, in general, answerable save for torts actually authorized by him expressly or impliedly. But when the agent is a servant, his employer will answer not merely for all torts actually authorized, but also for all those which are committed by the servant while engaged in doing his master's business, whether they are authorized or not."

Greatly as I respect any statement of law contained in Salmond, this statement does not appear to me to be adequate or exhaustive, and that there is a field between the relation of master and servant and independent contractor where the relation of principal and agent comes in and where the principal is liable for the tort of the agent committed in the course of his employment. Further, I am unable to reconcile the statement in Salmond with the authorities and cases above cited, and particularly with the decision of this Court in Duffield v. Peers (supra) and of the British Columbia Court of Appeal in Katz v. Consolidated Motors Ltd. & Thomson (supra). It would appear from the report of Duffield v. Peers that the appellant company exercised much less control over its agent Peers in the performance of his duties than was exercised by the defendant company in the case at bar over its co-defendant Wilbert Sinclair. I cannot find that Duffield v. Peers has ever been overruled or adversely commented upon in any reported case, and it being a decision of this Court, in my opinion it is our duty to follow it, and I follow it with less reluctance because when the question arises as to which should suffer from the negligence of the defendant company's agent in the course of his employment, the employer or the innocent victims of his wrongful act, I think it but just and right that the employer should suffer and not the victims. The tendency of modern judicial decisions has not been to restrict but rather to extend the liability of principals and masters for torts committed by their agents and servants in the course of their employment. In my opinion this tendency is a sound one and should be continued, particularly having regard to the fact that every year an increasing percentage of the country's business is done by corporations which can only act through agents or servants. These agents or servants are usually not in a financial position to compensate persons who may be injured by their negligence or other tortious acts, and when the question arises as to which should suffer, the

employer or the innocent victim, for the negligent or wrongful act of the agent or servant committed in the course of his employment, it appears to be but just and right that it should be the employer and not the innocent victim. The employer can and no doubt usually does secure protection from the risk by insurance, the cost of which forms part of the general cost of carrying on the business and is ultimately borne by the general public.

Counsel for the defendant company contended that Wilbert Sinclair was "an independent contractor" and not the servant of the defendant company, and the cases relied on by him were cases dealing with the question of the liability of the master for the torts of his servant, and as to whether the person employed was a servant or an independent contractor. They do not deal with the question of the liability of a principal for the torts of his agent, which appears to me to be the real question in issue on this appeal.

If the facts were found by the jury, which I have already intimated a jury could properly find, I am of the opinion that the defendant company should be held liable for the negligence of the defendant Wilbert Sinclair and that the learned trial Judge was in error in dismissing the action as against the company. . . In the case at bar, however, though all the evidence may be before the Court, the facts have not been found by the jury; and either party is entitled to the jury's findings. I pointed out earlier the facts that in my opinion a jury might find; but that is not to say that a jury would necessarily find them. I think, therefore, that there must be a new trial.

The defendant Wilbert Sinclair was in the employ of the defendant company at the time of the trial, and he did not appear to give evidence on his own behalf nor was he called by the defendant company. Having regard to the evidence given and the provisions of The Highway Traffic Act, R.S.O. 1927, c. 251, there is no question that it was the negligence of the defendant Wilbert Sinclair that caused the injury which resulted in the death of Kerr, and this was not disputed by counsel for the defendant company on the appeal. No further evidence, therefore, is to be taken on this aspect of the case. The new trial must proceed on the footing that the negligence of the defendant Wilbert Sinclair, resulting in the death of Kerr, is established.

As there can be only one assessment of damages for the tort complained of and as I think a jury should pass upon the facts of the case, the Court should not exercise the power given it by The Judicature Act, R.S.O. 1927, c.88, s.26, to direct that judgment be entered against all defendants for the damages assessed by the learned trial Judge, but the Court, in the exercise of its discretion, should confine the new trial to the question of the liability of the defendant company for the negligence of the defendant Wilbert Sinclair and to the assessment of damages as against the defendants, and the judgment should be varied accordingly.

The defendant company should pay the costs of the former trial and of this appeal.

MIDDLETON J.A. (dissenting): . . . Sinclair was, I think, as carrier, an agent of Bright, but he was not in the strict or any other sense of the term a servant of Bright. In Salmond's Law of Torts, 9th ed., pages 88 and following, the learned text writer defines as an agent "any person employed to do work for another" and divides agents into two

classes distinguishable as (1) servants, and (2) independent contractors. It is for the first kind of agent only that the employer is responsible under the rule in question. This distinction is not observed by all writers and care must be taken in considering other authors to see that the words are not used in some other sense, e.g. in Halsbury a distinction is drawn between agents and independent contractors, the author using there the term "agent" as equivalent to "servant".

The distinction between the "servant" for whose acts the master is responsible and the "independent contractor" for whose acts the master is not responsible, has often been the subject of discussion. The test is the existence of a right of control over the agent in respect to the manner in which the work is to be done. If the master retains the supervision and direction of this in his own hands, the agent is a servant. If he does not, the agent is an independent contractor. This is well illustrated by the cases that have arisen in connection with the driving of vehicles. If one is driven by his own chauffeur whom he can control he is liable for a running down upon the highway. If on the other hand he is driven by the owner of the vehicle, or the agent of the owner, as in the case of a taxicab, he is not liable unless he assumes control...

Upon the argument much was said of Duffield v. Peers (1916), 37 O.L.R. 652. It is a most unsatisfactory case, and I find it impossible to ascertain what it did determine...I take it the judgment really decides that there was evidence to go to the jury that the employee was about his master's business when the accident happened. If the case decided more than this, it is in conflict with much more weighty decisions, none of which was cited or discussed.

The plaintiff was in this case driven to ascertain the facts concerning the employment to calling and examining Bright's employee Johnston, and his evidence is the only evidence upon the facts relating to the employment, so that there is nothing in dispute. There is nothing that could be submitted to a jury, and I think that here the learned Judge was right in granting a non-suit as to Bright.

[Macdonnell J.A. agreed with the Chief Justice.]

The defendant company appealed to the Supreme Court of Canada.

DUFF C.J. (dissenting)....By force of the Regulations, Sinclair, who, admittedly, was not a common carrier within the meaning of the Regulations, could only lawfully be in possession of the parcels of wine he was carrying as agent of the appellants. I am inclined to think that, under the principle stated by Sir George Jessel in Re Hallett (1880) 13 Ch.D. 696, at 727, it is not competent either to the appellants or to Sinclair in an action of this character to deny that the wine was in fact entrusted to Sinclair for carriage and delivery as the agent of the appellants:

> Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilized countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and

deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

In any case, a jury would be entitled to find as a fact that the manager of the appellants' store was familiar with the purport of the Regulations governing the sale of the wine at the store and, moreover, as a consequence, that Sinclair was entrusted with the wine in the only capacity in which (not being a purchaser or approved carrier) he could lawfully be entrusted with it, namely, as the agent of the appellants.

The parcels having been placed in Sinclair's custody as agent, obviously it was his duty as agent to take reasonable care for the safe carriage and delivery of the wine and it would be clearly open to the jury to find that, as incidental to that duty, he was under an obligation to his principal in respect of the management of the motorcycle; and it would be incumbent upon the trial judge to instruct them that if they thought Sinclair's duty as agent embraced the duty to manage his motorcycle in such a manner as not to risk the loss of the wine or any part of it, it was for them to say whether the management of the motorcycle generally was a matter incidental to the functions expressly entrusted to him.

It would appear to be necessary to make some reference to the ground upon which the responsibility of a principal for the acts of his agent rests.

Respondeat superior is a rule which does not rest upon any notion of imputed guilt or fault. The fallacy that it does was responsible for the difficulty that great lawyers of the last century felt (Bramwell B. for example) in admitting the liability of a corporation for the fraud of its agents. In Hern v. Nichols (circa 1700) 1 Salkeld 289, the point in issue was the responsibility of a merchant for the deceit of his factor beyond the sea. Holt C.J. states the broad ground of responsibility thus: ". . . for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger." In Hall v. Smith, (1824) 2 Bing. 156, at 160, Best C.J. says: "The maxim of respondeat superior is bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it."

The principal having the power of choice has selected the agent to perform in his place a class or classes of acts, and, to adapt the language of Henn Collins M.R. in Hamlyn v. Houston, [1903] 1 K.B. 81, at 85-86, it is not unjust that he who has selected him and will have the benefit of his services if efficiently performed should bear the risk of his negligence in "matters incidental to the doing of the acts, the performance of which has been entrusted to him."

The rule has been precisely explained in the House of Lords in two modern cases in which Story's statement of it has been adopted. In Percy v. Corporation of the City of Glasgow, [1922] 2 A.C.299, at 306, Lord Haldane said:

> As was laid down by Story in a passage adopted in an earlier case by Blackburn J. and approved in this House in Lloyd v. Grace, Smith & Co., [1912] A.C. 716, 737, "the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them'." The limitation is that "'the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any other matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit.'"

In Lloyd v. Grace, Smith & Co. mentioned by Lord Haldane, these passages from Story were made part of the reasoning of Lord Macnaghten's judgment in which Lord Loreburn, Lord Atkinson and Lord Shaw concurred. They had previously been quoted by Lord Blackburn (Blackburn J. as he then was) with apparent approval in delivering the judgment of the Queen's Bench (Cockburn, C.J., Blackburn, Mellor and Lush JJ.) (McGowan & Co. v. Dyer (1873) L.R. 8 Q.B.141, at 145). Story's statement of the law having been thus adopted and acted upon by the House of Lords, it is, I think, binding upon this Court. (Robins v. National Trust Co., [1927] A.C. 515, at 519.). . .

The appeal should be dismissed with costs.

KERWIN J. ....The only question in this appeal, to my mind, is whether the relationship of master and servant existed between the appellant and Wilbert Sinclair whereby the former would be rendered liable for the collateral negligence of the latter.

Lord Blackburn in Dalton v. Angus (1881), 6 App. Cas. 740, at 829, states: "Ever since Quarman v. Burnett (1840), 6 M. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them." Omitting all reference to circumstances where the employer owes a duty which he cannot avoid by hiring another, I do not read any of the decisions that are binding on this Court and that are usually cited for the purpose, as altering the law as thus set forth and in effect Pollock and Salmond in their books on Torts treat this statement to be the result of the cases.

In the Thirteenth Edition of Pollock, at p. 82, the author points out that the rule being that a master is liable for the acts, neglects and defaults of his servants in the course of the service, it is necessary to define "servant", and states as to this point that "it is quite possible to do work for a man in the popular sense, and even to be his agent for some purposes, without being his servant". That part of the text which follows, and which I transcribe, was approved by McCardie J. in Performing Rights Society v. Mitchell and Booker, [1924] 1 K.B. 762: "For the acts or omissions of such a one about the performance of his undertaking his employer is not liable to strangers, no more than the buyer of goods is liable to a person who may be injured by the careless handling of them by the seller or his men in the course of delivery."

To the same effect is the Eighth Edition of Salmond which at pages 88 and 89 draws the distinction between the case of a principal who is liable only for those acts of his agent which he expressly or impliedly authorized but which rule is subject, so far as here applicable, to an exception which governs the particular form of agency which exists in the case of master and servant.

In the case at bar it may be assumed that the appellant knew that the delivery of wine would be made by motorcycle and that it, therefore, authorized the delivery by that means. But while the appellant had the right to take the work out of Sinclair's hands, it had not the right to say that he was to continue the work and direct him during the continuance of it. In thus paraphrasing another extract from the judgment in the Performing Rights case, I have not overlooked the fact that McCardie J. was there considering the test to be applied in deciding whether a man is a servant or an independent contractor, but I think the test is also the proper one as to when a man is that particular class of agent defined as servant. Indeed it is but an elaboration of the definition given by Lord Justice Bramwell in Yewens v. Noakes (1880), 6 Q.B.D. 530, at 532, where he says, "a servant is a person subject to the command of his master as to the manner in which he shall do his work."

The matter is discussed in the Fourth Edition of Bevan on Negligence, at p. 713, where the author, after quoting this definition, also gives the evidence of Lord Justice Bramwell taken before the First Committee of the House of Commons on Employers' Liability, and then continues: "Once again, the distinction between a servant and an agent is the distinction between serving for and acting for. An agent as contrasted with a servant has a discretion as to the time and manner of performance, and sometimes as to acting or not acting."

In my judgment, Wilbert Sinclair was the agent of the appellant so as to make the latter liable for anything done by him with its authority. But the appellant is not liable for Sinclair's negligence in driving the motorcycle, as that was a casual or collateral matter which the appellant did not authorize expressly or by implication. Not being subject to the appellant's control as to the manner of driving, Sinclair was not its servant. There was no evidence of any authority in Sinclair to drive negligently and there was, therefore, nothing to leave to the jury. I would allow the appeal with costs in this Court and the Court of Appeal and restore the judgment at the trial.

Appeal allowed with costs.

[Davis J. agreed with Duff C.J. Crockett and Huson JJ. agreed in the majority judgment.

On both appeals the defendant argued another point, here omitted, that the plaintiff by taking and entering judgment against the Sinclairs was precluded from proceeding further against the Bright Co. on the ground that all three were joint tortfeasors. Both Courts held that under the circumstances the defendant failed on this issue. On this problem generally, see infra p.

See comments by [C.A.W.]right in (1937), 15 Can. Bar Rev. 285; Laskin, in (1938), 16 Can. Bar Rev. 809.

See also secs. 2 and 220 of the American Law Institute's Restatement of Agency.

Cf. Baty, Vicarious Liability, chap. II, Liability for Agents, especially at p. 37: "There are to be found in the English cases other very sweeping expressions regarding the liability of principals for the misdeeds of their agents.

This, however, is only loose language. Judges will speak of 'agents' in one sentence, and of their 'masters' in the next. They have in mind, though they speak of 'agents', really only the case of the agent who is a servant, which is the only case they are considering....The truth of this proposition, that the word 'agent' is used in these cases as a descriptive equivalent for 'servant who is an agent' is thrown into clear relief by Smith v. Martin, [1911] 2 K.B. 775. If it is enough to show that the subordinate was an agent, why was it considered so essential to establish in that case the relationship of master and servant? It would have been much easier to show that she was the Council's agent to teach."]

CHOWDHARY v. GILLOT. King's Bench Division. [1947] 2 All E.R. 541.

The plaintiffs, a doctor and his wife, were injured in a collision between a motor car and a lorry. The doctor, the owner of the car, had left it with Daimler Co. Ltd. (the second defendants) for repairs, and, on his asking the company's receptionist if he could have a "lift" to the nearest railway station, Gillot, the first defendant, who was employed by the company, was instructed to drive him and his wife to the station in his (the doctor's) own car. On the way to the station, the car collided with a lorry driven by Jones, the third defendant. It was found that Gillot was negligent. The judgment deals with the company's liability for Gillot's negligence.

STREATFEILD J. . . . It is material to go back into the history of the relationship between Dr. Chowdhary and the Daimler Co. For some ten or twelve years he had been a valued customer of the Daimler Co. He was in the habit of taking his Daimler car to their works and leaving it with them for servicing and repairs some three or four times every year. He either stated his requirements verbally or brought a rough list of the repairs which were required, and his instructions, either verbal or written, were then transferred to a form, which was headed "Repair order--chargeable" by one of the receptionists of the defendant company. If this form was then and there made out, he signed it on the premises; otherwise the company posted him a form two or three days later, which he signed at his home and returned to them. He tells me that he never at any time read the conditions on the back of that form, which is not altogether surprising, and he supposed that they contained what he called the ordinary conditions which garage people usually have on their contracts. On the front of this form which he was in the habit of signing were these words: "Please execute the undermentioned work and charge the same to my account in accordance with the conditions on the back hereof." On the back are some eleven conditions, No. 4 of which reads:

> If a customer's car and/or chassis shall be driven at any time by one of the company's employees the employee shall be deemed for all purposes to be the servant of the customer who shall be entitled to all rights and shall discharge all liabilities incident to that relationship.

Before the war when cars and petrol were more plentiful than they are to-day, the Daimler Co. had been in the habit of sending Dr. Chowdhary to the nearest railway station after he had left his car for repairs. For that courtesy ser-

vice, as it may be called, they used one of their own cars and their petrol and one of their own drivers. It was a service which was rendered to other people as well, but in Dr. Chowdhary's case it was rendered, not only to an old and valued customer, but also to one who was described by the receptionist as a "No. 1 priority customer", Dr. Chowdhary being a medical practitioner. During the war the shortage of petrol and cars prevented them from rendering that service in the same way, but, at his request, when he had taken his car for repairs they continued, whenever possible, to provide one of their own servants to run him to the nearest station in his own car and bring it back to their works immediately afterwards.

On Nov. 23, 1944, Dr. Chowdhary took his wife in his car to the Daimler works to have the car repaired. He either gave a list of requirements to the receptionist, Mr. Heagan, or Mr. Heagan received them verbally and memorised them. It does not matter which, but, in fact, he signed no order form there and then. Presumably, a form would or might have been sent to him later, but in the events which happened he never received nor signed one of these repair order forms. Having taken his car to the Daimler works, he was first minded to walk with his wife to the Park Royal station, some 15 minutes walk away, but on second thoughts he asked Mr. Heagan if he could have a lift to the nearest station, and, accordingly, Mr. Heagan detailed Gillot, who was a tester and tuner at their works and a driver of some 40 years experience, for the job. Accordingly, Dr. Chowdhary and his wife got into the back of the car and Gillot drove them. On the journey to the station the accident occurred, caused, as I have already found, by Gillot's negligence. It is on these facts that I am asked to find, first, on common law principles, that there was a temporary transference of their paid servant by the Daimler Co. to Dr. Chowdhary so as to pass the right or authority to control him in "the way in which the act involving negligence was done." . . .

[Discussion of the Mersey Docks and Century Insurance cases is omitted.]

Counsel for the company. . . contends, first, that the car had not at the material time been handed over to the Daimler Co., and he relies on certain answers given in cross-examination by Dr. Chowdhary as to the control which he felt that he could exercise over Gillot when driving the car. I need not quote them in detail. They were, in fact, answers whereby he agreed that if Gillot had driven the car dangerously he would have felt at liberty to check him, and, if he had refused to slow down or to drive more carefully, he would have forced him to, or would have taken over the wheel himself. That was really the first point of counsel for the company, i.e., that the car still remained in the custody of Dr. Chowdhary and had not yet been handed over to the company. The second point that he raised in effect was that he discharged the onus, heavy though it was, by pointing to the fact that Gillot was lent to drive the car for its owner who was present in the car and retained possession of it and the right to control the manner of the driving. It is, of course, that detail which distinguishes this case from Mersey Docks and Harbour Board v. Coggins & Griffiths. It appears that there is no case right on all fours with the present one, but counsel for the company relies on the principle laid down in Samson v. Aitchison, [1912] A.C. 844, and also on Pratt v. Patrick, [1924] 1 K.B. 488.

With regard to Samson v. Aitchison I need only read the headnote which is as follows: "Where the owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not if itself exclude his right and duty of control; and, therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving." In his judgment which was approved in the Privy Council the trial judge said: "I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shown by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver, "Do this', or 'Don't do that." The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver . . . The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person--that is to say, if there has been a bailment by the owner to a third person--the owner has given up his right of control." On that principle counsel for the company contends that he has discharged the onus which lies on him of showing that there had been a transfer of the servant to Dr. Chowdhary because Dr. Chowdhary was riding in his own car and remained in possession of it and retained the right to control.

In my opinion, the fact that Gillot was lent to the doctor to drive his own car in those circumstances casts the burden of proof on Dr. Chowdhary to show that in all the circumstances he had in some way abandoned his right to control or in some way had "contracted himself out of" that right, to quote the words that I have just read. On that question I have given careful consideration to the argument of counsel for the plaintiffs. As I have said, in determining this question I have to consider the whole of the surrounding circumstances, and, in my judgment, the facts do support the view that Dr. Chowdhary had no right, or had abandoned his right or authority, to control Gillot at the material time. My reasons for that conclusion are these: (i) the car, in my view, had been delivered to the Daimler Co. for repairs and the order had been accepted, and from that moment onwards the Daimler Co. were in possession of that car as bailees; (ii) thereafter and so long as the bailment continued, Dr. Chowdhary had no right to control the bailees' servants; (iii) in my opinion, he was doing no more than receiving the benefit of the Daimler's courtesy service, as I have called it, just as though it had been in their own motor car and with their own petrol as in former days, and the mere fact that it was the customer's own car did not, in my view, prevent it from being part of their service towards him; (iv) there is some indication, without laying undue stress on it, of the doctor having abandoned his right to control from the fact that he got into the back of the motor car, and, beyond telling Gillot which of two equi-distant stations he was to drive to, he was not in a position to exercise any right of control over the driver in the sense in which I interpret the word "control". It is true that he could have ordered him

to drive more carefully if he was driving dangerously, or to drive more slowly if he was driving at an uncomfortable or dangerous speed, and so forth, but that, in my opinion, is really no more than common prudence dictates. Perhaps the control would be stronger in the case of a person whose own property, whose own life, perhaps, or whose own wife was involved, but it is no more than the control, or checking--if that is the right word--that one would exercise towards a taxicab driver who might behave in the same way. The taxicab driver, of course, is not the servant of the fare. But the doctor could not have ordered Gillot to stop and wait for him for half an hour. He could not have ordered him to deviate and to wait for him while he was visiting a patient. He could not have ordered him to drive him to a more distant place for his own purposes. An illustration was put before me that, supposing he had said he was in a hurry to catch his train and ordered the driver or purported to order him to drive more quickly and, if there was a regulation or a prohibition by the employers against driving customers' cars at more than, say, 20 miles an hour, Gillot would have been in a position to refuse to carry out any such orders. All orders or control of that type were directions which Gillot could have declined to obey from the person who, it is now contended, was his temporary master.

It seems to me, therefore, that in those circumstances the only control which Dr. Chowdhary could have exercised over Gillot would have been to tell him where he wanted to go to within the very narrow limits of the service which was being given to him, and beyond that, the car having been handed over to the bailees, he had no authority to control it. The service was extremely short. It could have been done in a matter of a few minutes. Gillot never clocked off from his own employers and he really performed this duty as part of his ordinary work. Indeed, I find it difficult to suppose that, had he been stopped by a policeman who asked him whose servant he was, he would not have said at once: "I am the Daimler Co.'s servant, and I am driving this car for a customer." One cannot possibly imagine that he would have gone on to say: "I am ordinarily a Daimler man but five minutes ago with my consent, express or implied, I became the servant of a new master and five minutes hence I shall revert to my former employment under my general masters."

With regard to Pratt v. Patrick on which reliance is placed, in my view, that is quite a different situation. In that case there was a delegation of the control of the car by the owner to a casual driver while the owner himself remained in the car ready to control, if he was so minded, or to direct the driver. There was no question of the car having been handed over to anybody. There was no evidence there of any abandonment by the owner of his right to control it. In Samson v. Aitchison the circumstances were, perhaps, even stronger against the contention which has been put forward by counsel for the company, because there, on the findings in the judgment the owner had actively directed Collins, the driver of the car, and the whole object of the journey in question was the driving of the car on a test with the view to the sale by the owner to a prospective purchaser. It seems clear in that case that there was not only a retention of the right to control, but the exercise of the right to control by the owner who remained in the front seat on exchanging the driver's seat with Collins. In my view, having regard to all the circumstances, Dr. Chowdhary could not, in the present case, control the driver in the way that I have stated, but the Daimler Co. were performing their service towards the doctor by lending him the services of their own servant, and not by transferring the servant himself to him. In my judgment, therefore, the first contention of counsel for the company fails, and on common law principles Gillot did not become the particular servant of Dr. Chowdhary.

The second contention is that by the terms of the contract set out on the form, condition 4 of which I have already read, the servant of the company driving the customer's car must be deemed to be the servant of the customer who is liable for all liabilities incidental to the relationship of master and servant. No doubt, condition 4 on the back of this form is a valid condition and would be binding on the contracting party even if he had not read the conditions. My attention was drawn to Hood v. Anchor Line (Henderson Brothers), [1918] A.C. 837, and it is not disputed that that would be the position, but, in fact, Dr. Chowhary never signed the form. He never saw the form on the material occasion, nor, indeed, was such a form in existence, nor did it ever come into existence. Even if it would or might have come into existence afterwards and have been signed by the doctor, I must make no assumption on that matter, and I cannot hold Dr. Chowdhary bound by a condition before it became an expressed condition. Even if he is to be taken to have contracted on the usual terms, whatever they were, I do not consider that condition 4 refers to a journey such as that which was undertaken in this case. I think that in its context, on an agreement which is called a repair order, the condition in question refers only to the driving of customers' cars incidental to the actual repairs carried out or to be carried out, e.g., a test, or taking the car from one garage to another--that sort of journey--but I do not consider that it covers the courtesy service of which we have heard in this case. I do not think it could ever have been contemplated that, when the company were rendering a service of this sort to their own customer, this condition on the repair order made the driver the servant of that customer and that the customer who was being taken to the station should carry all the liabilities of the relationship of master and servant. For these two reasons, I think the second contention also fails, and I hold that at the time of the accident Gillot remained the servant of the Daimler Co. Ltd., his ordinary masters, and they are liable for his act of negligence.

I, therefore, give judgment for the plaintiff Dr. Chowdhary for £1,100 and Mrs. Chowdhary for £151.16s. against the defendants, Gillot and the Daimler Co. Ltd.

[Is it impossible to have the liability of two "masters"? See Restatement of Agency, sec. 226, comment a, illustration 2:

"P employs A as a messenger boy by the day, authorizing him to use a bicycle in performing his duties. B also employs A on the same terms. Neither knows of the employment by the other. A, having packages to deliver to the same destination for both P and B, places them on his bicycle and negligently runs into T while on his way to deliver them. Both P and B are subject to liability to T."

And see Gordon v. Byers Motor Car Company (1932), 164 Atl. 334 (Penn.). Byers Co. was engaged in selling motor trucks. Hazlett was in the gasoline business and was in the market for the purchase of a truck. It was agreed that Byers would furnish a truck and driver for one week to Hazlett to demonstrate the suitability of the truck. If at the end of the week he was satisfied he would pay the purchase price; if not, he would pay $10 a day for the use of the truck, driver, gas, etc. While the driver was unloading gasoline, the careless way in which he did it resulted in an explosion causing the death of plaintiff's husband. The Court held both Byers and Hazlett liable. "While manipulating the mechanism on the truck, . . Lewis [the driver] was acting in the course of his employment and instructions, actual or implied, received from Byers Co., as part of the demonstration of the performance of

the truck. In his efforts to deliver the gasoline to Hazlett's customer, he was carrying out the instructions of Hazlett. . . The Byers Co. controlled Lewis as demonstrator for the purpose of selling the truck, and Hazlett controlled him in delivering the gasoline. . . Lewis was the servant of both defendants negligently acting in the course of his employment by each."

What would be the result in Ontario on facts similar to the Chowdhary case? What if a third person had been injured by Gillot's negligence?

Defendants hired from the plaintiffs teams and drivers to move bags of sugar. The number of bags these drivers receipted for were greater than those delivered and when the plaintiffs sued for the hire of the teams, etc., the defendants counterclaimed for the missing sugar. From the evidence it appeared the loss occurred by reason of the drivers' negligence in not checking the number of bags appearing on the despatcher's record. The drivers receipted for the bags "at the instance" of the defendant. Should the defendant's counterclaim succeed? Canadian Storage Co. v. Toronto Storage Co. (1924), 55 O.L.R. 353.]

MERSEY DOCKS AND HARBOUR BOARD v. COGGINS & GRIFFITH (LIVERPOOL) LTD. House of Lords. [1947] A.C. 1.

The appellant board owned a number of mobile cranes, each driven by a skilled workman engaged and paid by them, for the purpose of letting out the apparatus so driven to applicants who had undertaken to load or unload cargo at Liverpool Docks. This was a regular branch of their business. The conditions on which these cranes were supplied were printed and headed: "Regulations and rates applying to the fixed and mobile cranes on land, available for general use on the dock estate at Liverpool and Birkenhead". They were incorporated in the contract of hiring. By reg.6: "Applicants for the use of cranes must provide all necessary slings, chains, and labour for preparing the article to be lifted, and for unshackling the same. They must also take all risks in connection with the matter. The board do not provide any labour in connection with the cranes except the services of the crane driver for power cranes. The drivers so provided shall be the servants of the applicants." As regarded "portable cranes", the stipulated rates varied according as they were provided "with board's driver" or "without board's driver". The respondent company were master stevedores who had hired from the appellant board the use of a portable travelling crane, together with its driver, Francis Newell, for the purpose of loading a ship called the Port Chalmers, lying at the quay at the North Sandon Dock, Liverpool, one of the docks of the appellant board. John McFarlane was a registered checker employed by James Dowie & Co., the forwarding agents who had engaged the respondent company as stevedores to load the cargo on the ship. On the night of August 22, 1943, he was engaged in checking goods which were in the course of being transferred from shed to ship by means of the crane, which did not run on fixed rails but could be moved in any direction by the crane driver. The crane, which was standing in the dock

shed, had picked up, under McFarlane's direction, a case of which he had to note the number and marks. While he was endeavouring to do so, instead of further movement of the crane being stopped till he could take the particulars, it was set in motion and driven on by Newall. The result was that McFarlane was trapped and struck by it and seriously injured. He brought an action for damages against the respondent company and in the alternative the appellant board, which was tried at Liverpool Assizes by Croom-Johnson J. From the evidence it appeared that the appellant board had engaged Newall, paid his wages, prescribed the jobs he should undertake and alone had power to dismiss him. The respondent company had the immediate direction and control of the operations to be executed by him with the crane, e.g., to pick up and move a piece of cargo from shed to ship, but had no power to direct how he should work the crane, the manipulation of the controls being a matter for him.

The following passages are from the evidence of Edward Pullin, head timekeeper in the employment of the respondent company: "Q. Beyond telling him to move the pile or heap or stack from one place to another, have you any other control over the way in which the crane is driven by the crane driver? --A. Well, we have no control over it, the way he drives it. We can only tell him what we want and it is not up to us to tell him how he has to drive it or anything. If he did not do it to our satisfaction we would certainly send in a complaint to the dock board... Q. It is very important that stevedores should have the right to tell him not only what to do . . . but, in most senses, how to do it? --A. Yes. We naturally hang the slings on and sling the stuff, but, of course, we leave it to the crane driver to take it in his way. We do not interfere with the driver of the crane." The following is from the evidence of John McDonough, staff foreman employed by the respondent company: "Q. What orders did you give the crane driver in regard to the movement of the cargo? --A. When we start we tell the crane driver to take the stuff up, to go and pick lifts up and put the goods in No. 1 or No. 2 or any particular hatch...Q. Have you anything to do, or have your men anything to do, with how he drives the crane, or when he puts his brake on, or whether he stops or anything of that kind? --A. No." The following is from the evidence of Newall: "Q. Who were you taking your orders from? --A. To take orders from the firm you are hired out, go where you are sent, do what you are told... Q. In order to move [the cases] did you go with your crane and pick up one over by the door, then reverse in a semi-circle? --A. And turn head on to the hatch... Q. Did you take orders from the checker to stop half-way along in your reverse circle? --A. I take no orders from anybody."

Croom-Johnson J. held that Newall was negligent and awarded McFarlane 247 l. damages and costs against the appellant board on the ground that Newall was employed by them. They appealed to the Court of Appeal, not disputing that Newall was negligent or that his negligence caused the accident, but contending that at the time he was in the employment of the respondent company. The court (Scott, du Parcq and Morton L.JJ.) dismissed the appeal. The appellant board appealed to the House of Lords, seeking to have the judgment against them discharged and to have substituted for it a judgment in favour of McFarlane for the same amount against the respondent company.

LORD PORTER. My Lords, I need not repeat the facts giving rise to the question to be determined in this appeal. That question is whose servant was the crane driver, Francis Newall, at the time of the accident. As to this matter I find myself in agreement with those members of your Lordships' House who sat to hear the appeal and only desire to add a few observations as to the principles concerned. In determining this question it has to be borne in mind that the employee's position is an important consideration. A contract of service is made between master and man and an arrangement for the transfer of his services from one master to another can only be effected with the employee's consent, express or implied. His position is determined by his contract. No doubt by finding out what his work is and how he does it and how he fulfils the task when put to carry out the requirements of an employer other than his own, one may go some way towards determining the capacity in which he acts, but a change of employer must always be proved in some way, not presumed. The need for a careful consideration of the circumstances said to bring about the change of employment has latterly been accentuated by the statutory provisions now in force for compulsory health and accident insurance and, in the case of many firms, by the existence of funds accumulated under a trust for the benefit of employees who will not lightly incur the risk of losing such benefits by a transfer of their services from one master to another. Nor is it legitimate to infer that a change of masters has been effected because a contract has been made between the two employers declaring whose servant the man employed shall be at a particular moment in the course of his general employment by one of the two. A contract of this kind may of course determine the liability of the employers inter se, but it has only an indirect bearing upon the question which of them is to be regarded as master of the workman on a particular occasion.

The indicia from which the inference of a change is to be derived have been stated in many different ways, notably in the words of Bowen L.J. in Donovan v. Laing, Wharton & Down Construction Syndicate, Ltd., [1893] 1 Q.B. 629, 634, where he says: "There are two ways in which a contractor may employ his men and his machines. He may contract to do the work and, the end being prescribed, the means of arriving at it may be left to him, or he may contract in a different manner and, not doing the work himself, may place his servants and plant under the control of another--that is, he may lend them--and in that case he does not retain control over the work." He adds, and Lord Esher M.R. uses the words to the same effect: "It is clear here that the defendants placed their man at the disposal of Jones & Co. and did not have any control over the work he was to do." In that case, as in this, a crane driver was lent to a firm of stevedores to enable them to load a ship and an employee of the wharfingers whose duty it was to direct the working of the crane was injured by the driver's negligence. In these circumstances it was held that his general employers were not liable, as they had parted with the power of controlling him. The appellants strongly relied upon both the inference drawn from the facts and the statement of principle contained in that case. If that statement means that the employer on whose work the man was engaged controlled both the object to be achieved and the method of performance I should think a finding, that that employer was liable, justified, but whether in view of the

later decision of M'Cartan v. Belfast Harbour Commissioners, [1911] 2 I.R. 143, in your Lordships' House the same inference would now be drawn from the facts proved in evidence in Donovan's case may be doubted. The decision itself is justified upon the finding of fact that all control had passed to the temporary master. A number of other tests have been suggested as helping to determine in particular cases under which of two employers the man was working at the relevant time. The appellant quoted and relied upon, amongst others, Rourke v. White Moss Colliery Co., 2 C.P.D. 205, 208, where the words were "actually employed to do their work", and Johnson v. W. H. Lindsay & Co., [1891] A.C. 371, 382, where the phrase, "working... to a common end", was used. For myself, I do not find much assistance in the circumstances of the present case from such expressions, especially as they were used with reference to men who had left their ordinary employment and taken on work for another employer, as distinguished from those who continued to do their ordinary work, though no doubt from time to time subjected to the directions of a third party as to the work they were to do.

Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this he will, as a rule, be the person liable for the employee's negligence. But is is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required; the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day, without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health, unemployment and accident. I cannot think that such a conclusion is to be drawn from the facts established. I would dismiss the appeal.

LORD UTHWATT. My Lords, arrangements for the supply by an employer of one of his workmen to a third party, whom I will call "the hirer", for the purposes of a particular job are common and have given rise to many disputes on the question whether, while engaged on the job, the watchman for the purposes of the maxim respondeat superior is to be treated as the servant of the general employer or of the hirer. The principles established by the authorities are clear enough. The workman may remain the employee of his general employer, but at the same time the result of the arrangements may be that there is vested in the hirer a power of control over the workman's acts and defaults and to exempt the general em-

ployer from that responsibility. The burden of proving the existence of that power of control in the hirer rests on the general employer. The circumstance that it is the hirer who alone is entitled to direct the particular work from time to time to be done by the workman in the course of the hiring is clearly not sufficient for that purpose. The hirer's powers in this regard are directed merely to control of the job and the part the workman is to play in it, not to control of the workman, and the workman in carrying out the behests of the hirer as to what is to be done is not doing more than implementing the general employer's bargain with the hirer and his own obligations as a servant of his general employer. To establish the power of control requisite to fasten responsibility on him, the hirer must in some reasonable sense have authority to control the manner in which the workman does his work, the reason being that it is the manner in which a particular operation (assumed for this purpose to be in itself a proper operation) is carried out that determines its lawful or wrongful character. Unless there be that authority the workman is not serving the hirer, but merely serving the interests of the hirer, and service under the hirer in the sense I have stated is essential. Whether there is or is not such service in any particular case is a question of fact, the object being to ascertain the broad effect of the arrangement made: see Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board. It may be an express term of the bargain between the general employer and the hirer, that the workman is to be the servant of the hirer or is to be subject in all respects to his authority. That in my opinion does not of itself determine the workman's position. The workman's assent, express or implied, to such a term would, I think, conclude the point one way: and his dissent conclude it the other way. In cases where the point cannot be disposed of in this fashion, the nature of the activities proper to be demanded of the workman by the hirer and the relation of those activities to the activities of the hirer's own workmen, are of outstanding importance in determining whether the hirer has in any reasonable sense authority to control the manner of execution of the workman's task. For instance, the position under the hirer of a craftsman entrusted for the hirer's purposes with the management of a machine belonging to his general employer, that machine demanding for its proper operation the exercise of technical skill and judgment, differs essentially from the position under the hirer of an agricultural labourer hired out for a period of weeks for general work. In the case of the craftsman the inference of fact may be drawn that he was not the servant of the hirer even though the bargain provided that he should be; and in the case of the agricultural labourer the inference of fact may be that he became the servant of the hirer, though the bargain provided that he should not be. The realities of the matter have to be determined. The terms of the bargain may colour the transaction; they do not necessarily determine its real character.

The facts of this case have already been stated and I do not propose to travel over them again. There is, however, one matter in the evidence to which reference should be made. The hiring agreement contained the following provision: "The drivers so provided" (i.e. the crane drivers) "shall be the servants of the applicants" (i.e. the respondent company). There is no evidence that the workman agreed to this provision or was indeed aware of it. Without his consent he could not be made the servant of the respondent

company. In light of the circumstances it is impossible to construe the provision as authorizing the respondent company to direct the manner in which the workman should do his work and for the purpose in hand I read the provision merely as stating what the appellant board and the respondent company agreed should be the legal result of an arrangement the operative terms of which are to be found elsewhere. Their agreement on a matter of law is immaterial. For the purposes of this case this point may be left there.

Applying the general principles which I have stated to this case the particular question to be determined is whether or not the respondent company had the authority to give directions as to the manner in which the crane was to be operated. To my mind it is clear they were not intended to have and did not have any such authority. The manner in which the crane was to be operated was and remained exclusively the workman's affair as the servant of the appellant board. The workman in saying in his evidence "I take no orders from anybody" pithily asserted what was involved in the hiring out of the crane committed to his charge by the appellant board, and, so far as the respondent company was concerned, gave an accurate legal picture of his relations to the respondent company. The respondent company's part was to supply him with work; he would do that work but he was going to do it for the appellant board as their servant in his own way.

With respect to the authorities I find myself in complete agreement with the observations made by the noble and learned Lord on the woolsack and I desire to refer to one matter only. The test suggested in Nicholas v. F. J. Sparkes & Son, [1945] K.B. 309, 311, 312, was as follows: "One test in cases of a vehicle, . . lent with its service to a hirer, is this question: 'In the doing of the negligent act was the workman exercising the discretion given him by the general employer or was he obeying. . . a specific order of the party for whom upon his employer's direction he was using the vehicle...?'" The test is not I think correct and to my mind the second question contained in the test leads to confusion. The proper test is whether or not the hirer had authority to control the manner of execution of the act in question. Given the existence of that authority its exercise or non-exercise on the occasion of the doing of the act is irrelevant. The hirer is liable for the wrongful act of the workman, whether he gave any specific order or not. Where there is no such authority vested in the hirer, he may, by reason of the giving of a specific order, be responsible for harm resulting from the negligent execution of that order. But is is not every order given by the hirer that will result in liability attaching to him. The nature and terms of the order have to be considered. For instance, an order given in the case under consideration to unload cargo from a particular hold in the ship would not--assuming that to be a proper operation--subject the hirer to liability for damage resulting from any negligent driving of the crane in carrying out the order. And lastly, where liability does attach to the hirer by reason of a specific order, that liability arises by the reason that in the particular matter he was a joint tort feasor with the workman. The general relation arising out of the contract of hiring is in no way involved. I would dismiss the appeal.

Appeal dismissed.

[The speeches of Lords Simon, Macmillan and Simonds to the same effect are omitted.]

STRAIT v HALE CONSTRUCTION 103 Cal 487 (C.A. 1972)

KERRIGAN, Associate Justice.

Two lawsuits were filed against three defendants as a result of a collision between a tractor (earthmover) and a truck on September 6, 1966, at the intersection of Route 115 and Allbright Street in the County of Imperial. The truck driver (Oliver Strait) was seriously injured in the collision and sued to recover damages for his injuries. The truck owner (Topham & Sons, a corporation) sued for the property damage to its truck. The earthmover was owned by a farmer (William E. Young, Jr.) and was being operated by his employee (Miguel Hurtado). Young had let the tractor and the operator (Hurtado) to a road construction firm (Hale Construction Company, a co-partnership). At the time of the accident, the road builder (Hale) was converting Allbright Street from a dirt road to a paved street.

The two actions against the farmer, the tractor operator and road builder (Young, Hurtado and Hale) were consolidated for trial. The jury awarded the truck driver $225,700 and the truck owner $8,603 against all defendants. This appeal ensued.

Negligence, contributory negligence, proximate cause and damages are *not* issues on appeal. The crucial problem involves the vicarious liability, if any, of the general employer (Young) and the special employer (Hale) for the negligence of the borrowed servant (Hurtado). The general employer claims that the court erred in instructing the jury as a matter of law that he

was liable for the loaned servant's negligence. The special employer claims that the trial court erred in denying its motions for nonsuit, directed verdict and judgment notwithstanding the verdict and in leaving the issue of vicarious liability to the jury.[1]

[1] We hold that where a general employer loans out a tractor and an operator to a special employer to assist in the construction of a public road, and where personal injury and property damage ensue to third parties as a result of the negligence of the loaned servant in the operation of the tractor, both the general employer and the special employer are liable for the tort of the borrowed servant.

In reaching the foregoing conclusion, it is necessary to review the factual background of these lawsuits as well as the law governing the liability of a general and special employer for the negligence of a loaned servant.

Hale Construction Company is a firm specializing in road and airport work. It entered into a contract with the county of Imperial and the federal government to do the work on Allbright Street. The job consisted of preparing Allbright Street for eventual hardtop surfacing. This required excavating dirt from some areas and building-up other areas which, in turn, required the use of earthmoving machines commonly called rigs. The work on Allbright Street was to be accomplished east and west of its intersection with Route 115.

After the road firm undertook the Allbright Street job, it found it was falling behind in its work schedule. Hale was under a completion deadline with a penalty of $[illegible] per day. Initially, Hale had the use of [illegible] John Deere 50–10 tractors (earthmovers or rigs). One was owned by Hale and operated by its own employee. The other two were rented, with the operators being provided by the equipment owners. Someone told Hale that Young owned a 50–10 tractor. To accelerate construction, Hale contacted Young about letting the rig with an operator.

Young is a farmer living near Calipatria in Imperial County. He uses the earthmover in connection with his extensive farming operations. He had never leased out the rig or operator prior to being contacted by the road builder. Inasmuch as the machine was not then being utilized in farming operations, he agreed to rent the rig and supply Hurtado as the operator for $18.00 an hour. Young was to pay Hurtado $5.00 an hour to operate the rig from the $18.00 hourly rental.[2]

Hurtado and the earthmover went on the construction job, worked for two weeks, and were temporarily terminated. A day or two before the accident, Hale again called Young and requested that Hurtado return with the rig to the job site.

In addition to a construction superintendent, the Allbright Street job was under the direct supervision of Raymond Hale, a general partner and officer of Hale Construction Company. Hale had a grade checker located at the place where the dirt was to be removed by the various tractor operators, as well as a dump boy at the site where the dirt was to be deposited by them. The grade checker would tell the rig operators where to cut and how deep to cut and the dump boy instructed them where and how to deposit the removed dirt. In removing and dumping the earth, it was necessary for the rigs to cross Route 115—a through highway—where it intersects with Allbright. Entrances to the highway on both sides of Allbright were posted with stop signs. In hauling dirt from a removal point west of the intersection to the dumpsite at a point east of the intersection, Hurtado collided with the truck being driven by Strait and owned by Topham & Sons which was proceeding north on Route 115.

1 The special employer (Hale) also contends the court erred in refusing three proffered instructions but in view of our resolution of the main issues, a discussion of the claimed error becomes moot.

2. The evidence is conflicting as to whether the farmer (Young) or the paving firm (Hale) furnished the gas for this particular rig, but such evidence is not significant to our decision.

Turning to the legal aspects of the two
16 lawsuits, cases involving the application of the *loaned servant rule* have not always been uniform in the results obtained. This observation is not new or novel. In 1928, an illustrious jurist came to the same conclusion when he wrote: "The law that defines or seeks to define the distinction between general and special employers is beset with distinctions so delicate that chaos is the consequence. No lawyer can say with assurance in any given situation when one employment ends and the other begins. The wrong choice of defendants is often made, with instances, all too many, in which justice has miscarried." (Cardozo, A Ministry of Justice, [1921] 35 Harv.L.Rev. 113, 121.) The passage of time has not eliminated the confusion. Courts have refused to attempt to differentiate and harmonize the case law on the grounds that to do so would merely add to the confusion; for the most part, the decisions have been characterized as irreconcilable. (See New York Central Railroad Co. v. Northern Indiana Public Service Co., 140 Ind.App. 79, 221 N.E.2d 442.)

The difficulty in determining the issue as to whether the general employer or the special employer, or both, should be liable for the tort of the loaned servant arose out of the test governing its application. In determining the vicarious liability issue, the courts have uniformly applied the *test of control, i. e.,* which employer had actual control or the right of control—the power to direct the borrowed servant in the details of the work at the time the tort occurred? In adopting the control theory and in weighing the elements of control, courts were inexorably driven to the expedience of making and accepting disparate refinements, ethereal in substance and revolting in reason, in order to reach any semblance of reconciliation of the results flowing from the borrowed servant cases. (See Smith, Scope of the Business: The Borrowed Servant Problem, [1940] 38 Mich. L.Rev. 1222, 1253.)

As in other jurisdictions, California courts applied the control test with varying results. In 1922, it was held that when a master (general employer) hires out under a rental agreement the services of his employee (loaned servant) for the operation of an instrumentality owned by the master, together with the use of the instrumentality, without relinquishing to the hirer (special employer) the power to discharge such servant, the legal presumption is that, although the hirer directs the servant where to go and what to do in the performance of the work, the servant who is the operator of the instrumentality employed in the doing of the work, remains, in the absence of an agreement to the contrary, the servant of the *general employer* insofar as concerns the manner and method of operating the instrumentality, and the general employer is solely liable for the servant's negligence in the operation of such instrumentality. (Billig v. Southern Pacific Co., 189 Cal. 477, 485–486, 209 P. 241.) In accord are other authorities holding that if the special employer does not have power to discharge the servant even though he directs the servant where to go and what to do in performance of the work, the servant, as operator of the instrumentality employed in the doing of the work, remains the employee of the *general employer,* with the latter being *responsible* under the doctrine of *respondeat superior* for the servant's negligence. (McComas v. Al. G. Barnes Shows Co., 215 Cal. 685, 12 P.2d 630; Mart v. Riley, 239 Cal.App.2d 649, 49 Cal.Rptr. 6; Doty v. Lacey, 114 Cal.App.2d 73, 249 P.2d 550; Lowell v. Harris, 24 Cal.App.2d 70, 74 P.2d 551.)

Conversely, the proposition has been propounded that an employee may be the general servant of one person and may be hired to another for a special service, and when he is subject wholly to the direction and control of the *special employer,* the *latter,* not the general employer, is *liable* for the borrowed servant's negligence; but to escape liability for the negligence of a servant whose services have been rented or hired to another, the general employer must resign full control of the servant for the time being. (See Doty v. Lacey, *supra,* 114 Cal.App.2d 73, 78, 249 P.2d 550.) In those

cases where the special employer may be liable, the paramount consideration is whether the alleged special employer exercises control over the details of the work; such control strongly supports an inference that a special employment exists. (McFarland v. Voorheis-Trindle Co., 52 Cal. 2d 698, 705, 343 P.2d 923.) If one employer hires out either the services of his employee to another employer or rents an instrumentality and an employee to operate it, the second or special employer may become temporarily liable for his tortious actions under the "borrowed servant" rule. (See Witkin, Summary of Calif.Law, [7th ed.], Agency and Employment, § 69, p. 442.)

With the development of the borrowed servant doctrine, another line of cases appeared suggesting that instead of imposing liability solely on the general employer or only on the special employer, a third alternative should be considered, to wit, both could be held liable. Under these authorities, the control factor was still utilized as the primary test in determining vicarious liability. A general and special employer may both be held liable for the employee's negligence where each had some power, not necessarily complete, of direction and control; the control need not be exercised; it is deemed sufficient if the right to direct the details of the work existed. (McFarland v. Voorheis-Trindle Co., *supra,* 52 Cal.2d 698, 704, 343 P.2d 923.) Where, at the time of the accident, both the general and the special employer exerted some measure of control over the employee, both may be held liable for the employee's negligence. (Rosander v. Market Street Ry. Co., 89 Cal.App. 721, 735, 265 P. 541.)

Consequently, three possible results have flowed from the application of the *control test* in the borrowed servant cases: (1) liability of the general employer; (2) liability of the special employer; and (3) liability of both employers.

Intertwined with the difficulty of applying the control test to the borrowed servant cases, has been the related problem of whether the liability of the general or special employer, or both, for the torts of the loaned servant is a question of law, a question of fact, or a mixed question of law and fact. In determining the agency question in the loaned servant cases, California courts have handled the issue in the following manner, depending on the facts, and inferences to be drawn therefrom, of each case: (1) Agency *existed* between the general employer and the employee as a matter of law (McComas v. Al. G. Barnes Shows Co., *supra,* 215 Cal. 685, 12 P.2d 630; Billig v. Southern Pacific Co., *supra,* 189 Cal. 477, 209 P. 241; Balding v. D. B. Stutsman, Inc., 246 Cal.App.2d 559, 54 Cal. Rptr. 717; Mart v. Riley, *supra,* 239 Cal. App.2d 649, 49 Cal.Rptr. 6); (2) agency did *not* exist between the general employer and the employee as a matter of law (Deorosan v. Haslett Warehouse Co., 165 Cal.App.2d 599, 332 P.2d 422; (3) agency *existed* between the special employer and the employee as a matter of law (Sehrt v. Howard, 187 Cal.App.2d 739, 10 Cal.Rptr. 128); (4) agency did *not* exist between the special employer and the employee as a matter of law (Lowell v. Harris, *supra,* 24 Cal.App.2d 70, 74 P.2d 551); and (5) those holding that whether a general employment or special employment relation existed ordinarily presents a question of fact (McFarland v. Voorheis-Trindle Co., *supra,* 52 Cal.2d 698, 343 P.2d 923; Moss v. Chronicle Pub. Co., 201 Cal. 610, 258 P. 88; Stewart v. California Imp. Co., 131 Cal. 125, 63 P. 177; Sparks v. L. D. Folsom Co., 217 Cal.App.2d 279, 31 Cal.Rptr. 640; Welborn v. Dalzell Rigging Co., 181 Cal. App.2d 268, 5 Cal.Rptr. 195; Miller v. Long Beach Oil Dev. Co., 167 Cal.App.2d 546, 334 P.2d 695; Deorosan v. Haslett Warehouse Co., *supra,* 165 Cal.App.2d 599, 332 P.2d 422; Doty v. Lacey, *supra,* 114 Cal. App.2d 73, 249 P.2d 550; Madsen v. LeClair, 125 Cal.App. 393, 13 P.2d 939; Valdick v. LeClair, 106 Cal.App. 489, 289 P. 673; Peters v. United Studios, Inc., 98 Cal.App. 373, 277 P. 156).

Capably recognizing the inconsistencies in the decisions resulting from the applica-

to the community at large.' (Prosser, Law of Torts [3d ed. 1964], p. 471, fns. omitted.)"

In an expert critique, a legal source points out why the *control* justification for liability should be discarded in the dual employer situation just as it has been abandoned in the single employer situation. In the case of a borrowed servant, both the general employer and special employer share control; while the general employer can fire the employee, the special employer can dismiss him from the particular job; while the general employer can direct the borrowed servant in the general use of the instrumentality, the special employer directs him on the particular aspects of the job at hand; control is thus actually *split* and it is a test without meaning. (Borrowed Servants and the Theory of Enterprise Liability, [1967] 76 Yale L.J. 807; see also Smith, Scope of the Business: The Borrowed Servant Problem [1940] 38 Mich.L.Rev. 1222, 1228-1231.)

[2] Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business.

Control, then, at least in the narrow sense suggested by Hale, is not dispositive in this case. The theory having greater integrity in *respondeat superior* cases is allocation of risk.

[3] In light of the policy factors underlying *respondeat superior*, it is inconceivable that Hale should escape liability. A special employment relationship with Hurtado was conclusively established. Obviously, the resurfacing work being accomplished was within the regular scope of Hale's business. Hale was to profit from this job. Hale understood the risks inherent in construction work and was in a position to guard against, and insure against, such risks. Consequently, Hale was not at all prejudiced by the trial court's ruling allowing the question of its liability to go to the jury. To the contrary, the court could have instructed the jury, in view of the foregoing policy factors, that the road builder was vicariously liable for Hurtado's negligence as a matter of law.

Finally, Young (general employer) urges that the trial court committed prejudicial error in ruling as a matter of law that Hurtado was his agent at the time of the accident. He contends the facts of the case are susceptible to more than one inference as to the relationship between himself and Hurtado, and the agency issue therefore required jury resolution.

[4] For an employer to be vicariously liable for the negligent acts of his servant, the servant must have been acting within the scope of his duties. Young seems to contend that when Hurtado was working for Hale, he was not necessarily working for Young. But as Young concedes, an employee can have more than one employer, both of whom may be simultaneously liable for a negligent act of the employee. (See McFarland v. Voorhees Trindle Co., *supra*, 52 Cal.2d 698, 343 P.2d 923; Rosander v. Market Street Ry. Co., *supra*, 89 Cal.App. 721, 265 P. 511, Rest. Agency (2d) § 226.)

This is just such a case. Young owned the tractor and was profiting from the renting of the rig, as well as Hurtado's employment with Hale. Young reserved the right to dismiss Hurtado. This analysis of Young's liability does not contradict the earlier discussion holding Hale liable despite previous case law that may not have held Hale liable. In those cases (Billig v. Southern Pacific Co., *supra*, 189 Cal. 487, 209 P. 211; Mart v. Riley, *supra*, 239 Cal. App.2d 619, 49 Cal.Rptr. 6; Lowell v. Harris, *supra*, 21 Cal.App.2d 70, 71 P.2d 551) the court held the general employer liable as a matter of law. The language questioned previously in those cases does not bear on that issue, but whether the special employer should also be liable.

Their holdings as to the general employer's initial liability are sound.

Young urges he should not be liable to the plaintiffs inasmuch as he is not in the business of renting heavy equipment and furnishing an operator. But the policy factors heretofore discussed weigh as heavily on Young as on Hale. While Young is a farmer and not directly engaged in letting construction equipment and providing an operator, his agriculture venture can be equated with any other enterprise engaged in business for profit. Farming in California can be big business. Tractors are driven on highways frequently and infrequently in agriculture production. One cannot expect to put a $24,000 rig and driver to work on a public highway—a place fraught with danger—without incurring liability for the operator's negligence. If Young did not feel he had sufficient control of the working conditions or sufficient knowledge of the construction business to guard against the risks, he could have contracted for specific indemnity or obtained the appropriate liability insurance. (See Widman v. Rossmoor Sanitation, Inc., 19 Cal.App.3d 734, 97 Cal.Rptr. 52.)

In conclusion, it should be parenthetically noted that Hale (special employer) and Young (general employer) have filed cross-complaints against the other based on implied indemnity.[3] In any future trial, the joint tortfeasors will then be accorded the opportunity to show, on equitable principles, why the other should be held primarily liable for Hurtado's negligence. In this connection, Young argues that Hale should have had a flagman on duty to warn drivers on Route 115 of the construction work being done on Allbright Street and of the heavy equipment crossing the main highway, or a flagman to direct the rig operator's crossing the highway, and that the failure to provide a flagman was the actual and proximate cause of this accident. Assuming, without deciding, that Hale had such a duty or assuming that even if Hale had no such duty, Young will have an opportunity to establish in his action for indemnity that Hale was primarily responsible for the injuries and damages incurred by the plaintiffs herein, particularly in view of the evidence indicating Young played a passive role in the events culminating in plaintiffs' damages. (See Atchison, T. & S. F. Ry. Co. v. Franco, 267 Cal.App.2d 881, 73 Cal.Rptr. 660.) However, the merits of the indemnity actions are not before us and patently cannot be resolved in this appeal.

The judgment is affirmed.

GARDNER, P. J., and GABBERT, J., concur.

3. The trials on the complaints and cross-complaints were bifurcated for obvious reasons.

CASSIDY v. MINISTRY OF HEALTH. Court of Appeal. [1951] 2 K.B. 343.

The plaintiff, a general labourer, was early in 1948 suffering from a contraction of the third and fourth fingers of his left hand, which his panel doctor diagnosed as Dupuytren's contraction. The doctor sent the plaintiff to Walton Hospital, Liverpool, where he was seen by a Dr. Fahrni, who was a whole-time assistant medical officer of the hospital. He confirmed the diagnosis and recommended an operation, which he personally performed on April 8, 1948. After such an operation the patient's hand and lower arm have to be kept rigid in a splint for eight to fourteen days, and while the plaintiff was undergoing this treatment he was under the care of Dr. Fahrni, Dr. Ronaldson, the house surgeon of the hospital, and the hospital's nursing staff. After some fourteen days the plaintiff's hand was released from the splint, when it was found that the hand was to all intents and purposes useless: both the fingers which had been operated on were bent and stiff and the trouble had affected the two good fingers, and after two unsuccessful manipulative operations all attempts to remedy the condition were abandoned.

The plaintiff in this action alleged that he had been negligently treated after the operation....At the trial, Streatfeild, J. gave judgment for the defendants on the ground that the plaintiff had failed to prove negligence on the part of any of the hospital staff. He gave no decision on the question whether Dr. Fahrni was a servant or agent of the Ministry, or whether, if he were, the Ministry would be liable for his negligence.

The plaintiff appealed.

SOMERVELL L.J. . . . In my opinion, on the basis that the hospital was responsible for all those in whose charge the plaintiff was, the surgeon, doctor, and nurses, the result seems to me to raise a case of res ipsa loquitur... I have therefore come to the conclusion that the prima facie evidence of negligence at some stage has not been rebutted, and that the plaintiff must succeed if the defendants are liable for the negligence of all those in whose care he was..

With regard to the position of surgeons or doctors, Lord Greene, M.R., said in Gold's case that the relationship of a consulting surgeon or physician precludes the drawing of an inference that the hospital authorities are responsible for their negligent acts. He treats the position of a house physician or surgeon as open. MacKinnon, L.J. said that the senior surgeon, Mr. Lockwood, was certainly not a servant of the hospital, the others probably not. Goddard, L.J. said that he was not considering the position of doctors on the permanent staff: that must depend on whether there was a contract of service and the facts of any particular case.

The evidence as to Dr. Fahrni's position is that he was an assistant medical officer: that he received a sum in lieu of residential emoluments which indicates that, if there had been accommodation, or perhaps if he had been a bachelor, he would have lived in; and that he was in whole-time employment. His engagement was subject to the standing orders of the council, but these are not before us. Dr. Ronaldson was a house surgeon working under Dr. Fahrni.

The first question is whether the principles as laid down in Gold's case cover them. In considering this, it is important to bear in mind that nurses are qualified professional persons. It is also important to remember, and MacKinnon, L.J. in Gold's case emphasized this, that the principle respondeat superior is not ousted by the fact that a "servant" has to do work of a skilful or technical character, for which the servant has special qualifications. He instanced the certified captain who navigates a ship. On the facts as I have stated them, I would have said that both Dr. Fahrni and Dr. Ronaldson had contracts of service. They were employed, like the nurses as part of the permanent staff of the hospital. In Gold's case, Lord Greene, M.R., in considering what a patient is entitled to expect when he knocks at the door of the hospital, comes to the conclusion that he is entitled to expect nursing, and therefore the hospital is liable if a nurse is negligent. It seems to me the same must apply in the case of the permanent medical staff. A familiar example is an out-patients' ward. One may suppose a doctor and a sister dealing with the patients: it seems to me that the patient is as much entitled to expect medical treatment as nursing from those who are the servants of the hospital. I agree that, if he is treated by someone who is a visiting or consulting surgeon or physician, he will be being treated by someone who is not a servant of the hospital: he is in much the same position as a private patient who has arranged to be operated on by "X".

Hilbery, J., in Collins v. Hertfordshire County Council, [1947] K.B. 598, found that there had been negligence on the part of a house surgeon and a surgeon who had undertaken part-time attendance at the hospital. He found the defendants liable by reason of a negligent system but he considered the question of the defendants' liability for the surgeons. He found that they were liable for the negligence of the house surgeon. He thought on the whole that they were not liable for the part-time surgeon, but his exact relationship to the hospital was obscure. As will be seen, I agree with his conclusion as to the house surgeon whom he regarded as covered by the ratio decidendi in Gold's case...

In my opinion the appeal should be allowed.

DENNING L.J. If a man goes to a doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment of him: and that is so whether the doctor is paid for his services or not. But if the doctor is unable to treat the man himself and sends him to hospital, are not the hospital authorities then under a duty of care in their treatment of him? I think they are. Clearly, if he is a paying patient, paying them directly for their treatment of him, they must take reasonable care of him; and why should it make any difference if he does not pay them directly, but only indirectly through the rates which he pays to the local authority or through insurance contributions which he makes in order to get the treatment? I see no difference at all. Even if he is so poor that he can pay nothing, and the hospital treats him out of charity, still

the hospital authorities are under a duty to take reasonable care of him just as the doctor is who treats him without asking a fee. In my opinion authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the selfsame duty as the humblest doctor; whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves: they have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ; and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. What possible difference in law, I ask, can there be between hospital authorities who accept a patient for treatment, and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not.

It is no answer for them to say that their staff are professional men and women who do not tolerate any interference by their lay masters in the way they do their work. The doctor who treats a patient in the Walton Hospital can say equally with the ship's captain who sails his ship from Liverpool, and with the crane driver who works his crane in the docks, "I take no orders from anybody". That "sturdy answer", as Lord Simonds described it, only means in each case that he is a skilled man who knows his work and will carry it out in his own way; but it does not mean that the authorities who employ him are not liable for his negligence. See Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd., [1947] A.C.1, 20. The reason why the employers are liable in such cases is not because they can control the way in which the work is done--they often have not sufficient knowledge to do so--but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct, the power of dismissal.

This all seems so clear on principle that one wonders why there should ever have been any doubt about it. Yet for over thirty years--from 1909 to 1942--it was the general opinion of the profession that hospital authorities were not liable for the negligence of their staff in the course of their professional duties. This opinion was based on a judgment given by Kennedy, L.J. in Hillyer v. St. Bartholomew's Hospital...

Even the judgment of Farwell, L.J. in Hillyer's case has not passed unscathed. He took the view that, when a patient went into hospital for an operation, which was to be performed (be it noted) by a consulting surgeon whom the patient himself selected and employed, the hospital authorities were not responsible for the negligence of the nurses in the operating theatre. This view was based on the supposition that the nurses, whilst in the operating theatre, became temporarily the servants of the consulting surgeon. This was a tenable view so long as Donovan v. Laing, Wharton, and Down Construction Syndicate Ltd. was an authority; but since then the House of Lords in Mersey Docks and Harbour

Board v. Coggins and Griffith (Liverpool) Ltd. have distinguished Donovan v. Laing, Wharton, and Down Construction Syndicate Ltd. almost out of existence: and there can be no doubt now that the nurses remain the servants of the hospital authorities, even when they are under the directions of the surgeon in the operating theatre. The reason is because the nurses are employed by the hospital authorities, paid by them, and liable to be dismissed by them; and the consulting surgeon has not that "entire and absolute control" over them which is necessary to make them his servants, even temporarily: see Gold v. Essex County Council, per Lord Greene, M.R. and per Goddard, L.J....

Relieved thus of Hillyer's case, this court is free to consider the question on principle: and this leads inexorably to the result that, when hospital authorities undertake to treat a patient, and themselves select and appoint and employ the professional men and women who are to give the treatment, then they are responsible for the negligence of those persons in failing to give proper treatment, no matter whether they are doctors, surgeons, nurses, or anyone else. Once hospital authorities are held responsible for the nurses and radiographers, as they have been in Gold's case, I can see no possible reason why they should not also be responsible for the house surgeons and resident medical officers on their permanent staff.

It has been said, however, by no less an authority than Goddard, L.J. in Gold's case, that the liability for doctors on the permanent staff depends "on whether there is a contract of service and that must depend on the facts of any particular case". I venture to take a different view. I think it depends on this: Who employs the doctor or surgeon--is it the patient or the hospital authorities? If the patient himself selects and employs the doctor or surgeon, as in Hillyer's case, the hospital authorities are of course not liable for his negligence, because he is not employed by them. But where the doctor or surgeon, be he a consultant or not, is employed and paid, not by the patient but by the hospital authorities, I am of opinion that the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he was employed was a contract of service or a contract for services. That is a fine distinction which is sometimes of importance; but not in cases such as the present, where the hospital authorities are themselves under a duty to use care in treating the patient....

The truth is that, in cases of negligence, the distinction between a contract of service and a contract for services only becomes of importance when it is sought to make the employer liable, not for a breach of his own duty of care, but for some collateral act of negligence of those whom he employs. He cannot escape the consequences of a breach of his own duty, but he can escape responsibility for collateral or casual acts of negligence if he can show that the negligent person was employed, not under a contract of service but only under a contract for services. Take first an instance when an employer is under no duty himself: he is riding passively in a car along a road; he is not under any duty of care himself to road-users, but the driver is. If the driver is a chauffeur employed under a contract of service, the employer is liable for his negligence: but if the driver is a taximan employed under a contract for services, the employer is not liable.

Take now an instance where an employer is under a duty himself: Suppose en employer has a lamp which overhangs his shop door; he is himself under a duty to his customers to use reasonable care to see that it is safe, and he cannot escape that duty by employing an independent contractor to do it. He is liable, therefore, if the independent contractor fails to discover a patent defect which any careful man should have discovered, and in consequence the lamp falls on a customer; but he is not liable if the independent contractor drops a hammer on the head of the customer, because that is not negligence in the employer's department of duty. It is collateral or casual negligence by one employed under a contract for services. The employer would, however, have been liable if he had got his servant to mend the lamp and his servant dropped the hammer; because that would be negligence by one employed under a contract of service. These distinctions are, however, of no importance in the present case, because we are not concerned with any collateral or casual acts of negligence by the staff, but negligence in the treatment itself which it was the employer's duty to provide.

Turning now to the facts in this case, this is the position: the hospital authorities accepted the plaintiff as a patient for treatment, and it was their duty to treat him with reasonable care. They selected, employed, and paid all the surgeons and nurses who looked after him. He had no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill, then the hospital authorities must answer for it, for it means that they themselves did not perform their duty to him. I decline to enter into the question whether any of the surgeons were employed only under a contract for services, as distinct from a contract of service. The evidence is meagre enough in all conscience on that point. But the liability of the hospital authorities should not, and does not, depend on nice considerations of that sort. The plaintiff knew nothing of the terms on which they employed their staff: all he knew was that he was treated in the hospital by people whom the hospital authorities appointed; and the hospital authorities must be answerable for the way in which he was treated.

This conclusion has an important bearing on the question of evidence. If the plaintiff had to prove that some particular doctor or nurse was negligent, he would not be able to do it. But he was not put to that impossible task: he says, "I went into the hospital to be cured of two stiff fingers. I have come out with four stiff fingers, and my hand is useless. That should not have happened if due care had been used, Explain it, if you can." I am quite clearly of opinion that that raises a prima facie case against the hospital authorities: see per Goddard, L.J. in Mahon v. Osborne, [1939] 2 K.B. 14, 50. They have nowhere explained how it could happen without negligence. They have busied themselves in saying that this or that member of their staff was not negligent. But they have called not a single person to say that the injuries were consistent with due care on the part of all the members of their staff. They called some of the people who actually treated the man, namely Dr. Fahrni, Dr. Ronaldson, and Sister Hall,

each of whom protested that he was careful in his part; but they did not call any expert at all, to say that this might happen despite all care. They have not therefore displaced the prima facie case against them and are liable to damages to the plaintiff. I agree that the appeal should be allowed.

[The judgment of Singleton L.J. is omitted.]

[In Roe v. Minister of Health, [1954] 2 Q.B. 66, a patient in defendant's hospital was given a spinal anaesthetic by an anaesthetist, Dr. Graham, assisted by the theatre staff of the hospital. The patient developed symptoms of spastic paraplegia after the operation because the anaesthetic, contained in sealed ampoules, had been contaminated through invisible flaws in the glass by a solution of phenol in which it was stored. The anaesthetist had been appointed as a visiting anaesthetist for the hospital and, although he carried on his private practice, he was under an obligation with another anaesthetist to provide a regular anaesthetic service for the hospital. In an action for damages, McNair J. refused to apply res ipsa loquitur since he held that the hospital was not liable in law for the acts of Dr. Graham, whose position he considered similar to that of a visiting surgeon. Hence the plaintiff must show negligence either of the hospital (or those for whom it is responsible, e.g. its nurses) or Dr. Graham. The Court of Appeal reversed this finding and held that res ipsa loquitur applied against the hospital since the hospital would be liable for Dr. Graham's work as an anaesthetist. Per Morris L.J.: "I consider that the anaesthetists were members of the staff engaged by the hospital to do what the hospital itself was undertaking to do."]

STAVELEY IRON & CHEMICAL CO. LTD. v. JONES [1956] A.C. 627, at 642.
per Lord Reid

The Court of Appeal reversed the decision of Sellers J., but different views were expressed on the law. Denning L.J., as I read his judgment, did not find it necessary to hold that the crane driver was herself negligent. He said[7]: "The employer "is made liable, not so much for the crane driver's fault, but "rather for his own fault committed through her. . . . He acts "by his servant; and his servant's acts are, for this purpose, "to be considered as his acts. Qui facit per alium facit per se. "He cannot escape by the plea that his servant was thoughtless "or inadvertent or made an error of judgment. If he takes the "benefit of a machine like this, he must accept the burden of "seeing that it is properly handled. It is for this reason that "the employer's responsibility for injury may be ranked greater "than that of the servant who actually made the mistake."

My Lords, if this means that the appellants could be held liable even if it were held that the crane driver was not herself guilty of negligence, then I cannot accept that view. Of course, an employer may be himself in fault by engaging an incompetent servant or not having a proper system of work or in some other way. But there is nothing of that kind in this case. Denning L.J. appears to base his reasoning on a literal application of the maxim qui facit per alium facit per se, but, in my view, it is rarely profitable and often misleading to use Latin maxims in that way. It is a rule of law that an employer, though guilty

of no fault himself, is liable for damage done by the fault or negligence of his servant acting in the course of his employment. The maxims respondeat superior and qui facit per alium facit per se are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it. " It has long been the established " law of this country that a master is liable to third persons for " any injury or damage done through the negligence or unskilful- " ness of a servant acting in his master's employ. The reason " of this is, that every act which is done by a servant in the " course of his duty is regarded as done by his master's orders, " and consequently is the same as if it were the master's own " act, according to the maxim, qui facit per alium facit per se " (*per* Lord Chelmsford L.C. in *Bartonshill Coal Co.* v. *McGuire* [8]). On the same occasion Lord Cranworth used the two maxims apparently without thinking that there was any difference between them (*Bartonshill Coal Co.* v. *Reid* [9]) and later authorities do not appear to me to establish any material difference. I do not think that the foregoing passage from Lord Chelmsford's speech will support an employer being held liable for something which was not negligent or wrongful on the part of his servant.

Denning L.J. refers to three cases in support of his view. *Jones* v. *Manchester Corporation* [10] was a complicated case in which there were considerable differences of opinion. Two doctors were negligent: they were employed by a hospital board and the question was who should pay the damages. I find nothing in the decision relevant to the present question, but there are statements that master and servant are joint tortfeasors. They may be treated as such, but that does not seem to me to lead to the conclusion that the master may be held liable for some act of the servant which was not negligent or wrongful on his part. In *Broom* v. *Morgan* [11] a husband and wife were fellow servants, and the wife was injured by the negligence of the husband. She recovered damages from her employer although she could not sue her husband. But, although the husband could not be sued, his injuring his wife was a wrongful act on his part, and again this case is to my mind no authority for a master being liable for an act which it was not wrongful for a servant to do. In *Stapley* v. *Gypsum Mines Ltd.*[12] two miners were in breach of a statutory regulation and one was killed and it was held that the fault of the other was a contributory cause of the accident. They had agreed together to break the regulation, but the employer did not and probably could not plead volenti non fit injuria. Whether an action by the widow against the fellow servant would have succeeded or have been defeated by such a plea or in some other way I do not know, but the fellow servant was certainly at fault; and this case again is no authority for the master being liable when his servant was not guilty of fault.

AYNSLEY v TORONTO GENERAL HOSPITAL, [1969], 2 O.R. 829, (1970) 7 D.L.R. (3d) 193 (Ont. C.A.)

AYLESWORTH, J.A.:—Appeals and a cross-appeal are taken from the judgment of Morand, J., delivered November 13, 1967, awarding the plaintiff respondent Stuart James Aynsley the sum of $67,352.85 against both defendants and the plaintiff respondent Elizabeth Aynsley the sum of $102,700 against both defendants, the award in each case carrying costs. The action arose from an incident which occurred in an operating theatre of the hospital on January 11, 1962, during the course of preliminaries to an "open heart" operation to be performed on Elizabeth Aynsley. As a result of the incident in complaint, she received serious permanent injuries. Personally involved in the incident were Dr. Matthews as senior anaesthetist retained by the patient and Dr. Porteous, an employee of the hospital, a senior resident therein in anaesthesiology and assigned by the hospital to assist Dr. Matthews in that part of the operation having to do with the preparation for the administration and the actual administration of anaesthetics to Mrs. Aynsley. The learned trial Judge found that the plaintiffs' damages were caused by the negligence of both doctors — Dr. Matthews to the extent of 60% and Dr. Porteous to the extent of 40%; he found the hospital vicariously liable to the plaintiffs by reason of the negligence of Dr. Porteous.

Dr. Matthews appeals to this Court against the finding that he was negligent, against the apportionment of the degrees of negligence and against the quantum of damages awarded. The hospital appeals against the finding that Dr. Porteous was negligent, against its having been found vicariously liable for such negligence, against the apportionment of the degrees of negligence between the two doctors and at the opening of its argument in this Court requested and was granted leave to appeal against quantum in the event Dr. Matthews' appeal succeeds in that regard. Finally, the plaintiffs cross-appeal against quantum seeking an increased award for the injuries sustained by Mrs. Aynsley.

It will be convenient as to much of the narrative to quote excerpts from the reasons for judgment of the learned trial Judge [[1968] 1 O.R. 425 at pp. 427-36, 66 D.L.R. (2d) 575 at pp. 577-86]:

> 'Elizabeth Aynsley suffered from a heart condition known as an atrial septum defect, being an opening between the right and left atria of the heart. She was examined by a number of doctors and after extensive tests an operation was scheduled for performance on January 11, 1962, for the repair of this opening. This is an involved operation where the blood system is side-tracked through an artificial heart[lung pump so that the heart may be opened up and the opening between the left and right atria may be closed. The operation commenced at approximately 8:55 a.m., January 11th, and involved, amongst other things, the recording of the arterial and venous blood pressure. This is a long operation, and the incident complained about took place at approximately 9:45 a.m.
>
> Prior to the actual opening of the heart, the venous system must be connected to a monitor which records, amongst other things, venous blood pressure in the patient. This recording is by way of a machine located in a room immediately adjacent to the operating room and can be seen through a window by the surgeons during the course of the operation. This procedure, at that time, was done by inserting a needle into a vein of the patient and on this particular patient, the needle was inserted into an anti-cubital vein, which is a vein in the arm. A clear plastic line is filled with a saline solution and is connected from the hypodermic needle to a machine called a transducer. This clear plastic line is about 5 feet long and consists of two pieces, approximately two and a half feet long connected in the middle with what is known as a three-way

stopcock. The transducer is then connected to the monitor machine in the next room. In order to obtain proper readings, the monitor in the next room must he calibrated and in order to do that one of the anaesthetists pumps the manometer, which is akin to a blood pressure instrument, to a height of 30 on the scale. The other anaesthetist then calibrates the machine in the next room. The purpose of the three-way stopcock is to allow the following:

1. the connection directly from the patient to the transducer;
2. to allow a connection from the patient to an opening on the stopcock;
3. to allow an opening from the stopcock to the transducer.

The handle of the stopcock travels in a 180° arc. When the handle is placed at a 45° angle from the direct opening of the stopcock from the patient to the transducer, nothing can move from the patient to the transducer or from the transducer to the patient or in any other direction. This is true when the stopcock is at 45° angle either way from the opening above referred to.

This operation was pioneered in Canada at the Toronto General Hospital in the year 1959 and resulted in the saving of many lives.

It is alleged by the plaintiff that the anaesthetist Dr. R. L. Matthews and/or his assistant Dr. Porteous negligently allowed air to escape from the manometer to the transducer and thence into the venous system of the patient . . . The defendant Dr. Matthews was a very highly qualified specialist in anaesthesiology and was clearly, in so far as the plaintiff was concerned, a privately employed anaesthetist and as such would clearly have a responsibility to the plaintiff. Dr. Matthews had been acting as anaesthetist for this type of operation for approximately two years. Dr. Porteous was also an extremely well qualified anaesthetist, although his qualifications were not quite as high as Dr. Matthews', nor had he had nearly as much experience as Dr. Matthews. Dr. Porteous was registered at the University of Toronto as a post-graduate student in anaesthesiology. So far as the evidence disclosed however, he spent all of his time at the hospital giving anaesthetics and was, in effect, learning by assisting other doctors in giving anaesthetics. He was provided with a bed room at the hospital and was given what is called a "living allowance". He was required to pay for his meals. Hospital that this was his true status, it appears to me that he was While a great deal was made by counsel for the Toronto General what is called an "interne" in popular parlance and was listed by the hospital as a senior resident in anaesthesiology. His name was contained on a list with other persons in the department concerned with the giving of anaesthetics and as his name came up he was allocated to assist different doctors in giving anaesthetics. He had commenced assisting in operations of this type which were known as "heart-lung pump operations" on December 1, 1961, and had assisted at probably twelve to fifteen operations of this type as of January 11, 1962. He had never hooked up a venous pressure system himself although he had assisted in calibrating the monitor on a number of occasions . . .

. . . . . .

A nurse prepared the plastic line and three-way stopcock by assembling them and then filled the line with a saline solution. She then turned the line wrapped in a sterile towel to Dr. Matthews.

The plaintiff Elizabeth Aynsley at this time had been given an anaesthetic and was unconscious.

Dr. Matthews inserted a hypodermic needle in an anti-cubital vein of the patient. He then connected the plastic line, above referred to, to the hypodermic and to the transducer. He set the three-way stopcock at a position which he thought was a completely closed position. That is, he set the handle at a position approximately 15° from a position where the line would be open from the patient to the transducer.

. . . . . .

After having connected the line as above, Dr. Matthews connected the monitor to the transducer.

After telling Dr. Porteous that they would calibrate the monitor, Dr. Matthews went into the next room where the monitor was located.

Dr. Porteous was at the head of the patient where the transducer and manometer were located.

> To calibrate the monitor it is necessary to pump the manometer to a pressure of 30 on the scales. While Dr. Porteous pumped the manometer up to 30 Dr. Matthews was to calibrate the monitor. The evidence discloses that two or three very light squeezes of the manometer bulb are required to bring the pressure up to 30. Upon a signal from Dr. Matthews, the pressure was so pumped by Dr. Porteous. The pressure in the manometer, however, fell back to zero. The procedure was followed again either once or twice by Dr. Porteous and then Dr. Matthews returned to the operating room and according to the evidence of Dr. Porteous, pumped the manometer button several times. Dr. Matthews does not remember doing this but does not deny it. At this point the surgeons announced that air could be heard in the heart and the patient suffered from cardiac arrest. Due to emergency procedures, however, the patient was kept alive.
>
> Other evidence disclosed that the three-way stopcock was allowing air to go from the manometer to the patient.
>
> The leak of air was so slow that the venous pressure did not push the blood into the plastic line prior to the pumping of the manometer. Other evidence indicated that air could leak through the stopcock if the valve was turned some 10 to 12 degrees off the 45° angle previously referred to in my judgment. After things had settled down in the operating room, Dr. Matthews noticed the valve on the stopcock was not at the 45° angle but slightly off.
>
> Also, the evidence discloses that had Dr. Porteous been looking he could have seen the air going through the line to the patient.

I have read all of the medical evidence adduced before the learned trial Judge and that evidence supports the findings of fact I have quoted. I concur in the conclusion of the learned trial Judge that both doctors were negligent and that the female plaintiff's injuries were directly attributable to that negligence. As to Dr. Matthews, ample evidence was led to show that means and methods were known and available in the operating theatre whereby the danger to the patient resulting from the stopcock not being turned completely to the off position could have been eliminated. Since none of these were adopted then it surely was incumbent upon Dr. Matthews to make doubly certain that the stopcock was in the fully off position; indeed the evidence makes it plain that all that was required was a high degree of care in checking to see that the stopcock was correctly positioned. Dr. Matthews knew the great danger to the patient if air was passed through the line to her and he knew that nothing stood in the way of this danger except the proper closing of the stopcock. After the harm had been done he noticed that the position of the stopcock seemed to be off the 45° angle; surely sufficient care when he set the stopcock for calibration would have precluded that error and prevented the harm to this patient. In my view, it was not enough for the doctor to approximate the 45° position of the stopcock in reliance, as is suggested on his behalf, upon the fact that never before in his experience had his adjustment of the stopcock resulted in a leak. There were three ways of checking whether the stopcock was at the 45° "closed" angle; the stopcock would be closed if the handle was placed over the corner of the stopcock, or if a line on the spindle of it was pointed to another corner, or if the extension of the handle on the other side of the spindle pointed at the opposite corner of the stopcock.

The doctor was negligent in another way.

The evidence establishes that failure to achieve the desired pressure in the manometer by pumping could be caused by a loose manometer or transducer connection, or a leak of some such sort and that this had occurred on previous occasions to the knowledge of both anaesthetists. I fail to perceive how this in any way detracted from the high duty on Dr. Matthews to see that any apparent leak was not caused by a failure to

close the stopcock and thus to shut off the venous line to the patient. Obviously a leak through that line would just as readily cause failure of the manometer to function properly as would a leak in some other part of the line as previously experienced and when faced with the actuality of a leak of some kind as shown by the manometer's performance, Dr. Matthews should have been careful immediately to check that the leak was not in the venous line to the patient. His failure so to alert himself or to be on the alert was negligent as was his permitting the manometer to be pumped several times and his participation in that pumping without such check.

Dr. Porteous was, I think, entitled to rely in the first instance on the proper closing of the stopcock by Dr. Matthews. He too, however, was fully aware of the danger to the patient if the stopcock were not fully closed and that the proper closing of the stopcock in the system in use was the only safeguard against serious injury. He, too, knew that his failure on pumping the manometer to maintain the desired pressure was due to a leak somewhere in the system and that "somewhere" might be through an improperly closed stopcock on the venous line leading to the patient. A turn of his head would have enabled him to glance at the venous line and had he done so, evidence of the faulty closing of the stopcock would have been revealed to him by the presence of bubbles in the venous line and the total or partial absence of the saline fluid therein. Dr. Matthews, as senior, was in the room where the calibrating machine was located leaving Dr. Porteous at the head of the patient in the operating theatre proper and as a skilled and competent anaesthetist Dr. Porteous, in these circumstances, also was charged with the duty of ascertaining that the manometer failure was not attributable to any fault or malfunction in the venous line to the patient. He did not take the simple precaution of glancing at the venous line, but instead continued to pump the manometer. Such failure and such pumping were negligent acts or omissions on his part and causative of the injuries sustained.

The hospital asks this Court to attribute to Dr. Matthews a higher degree of negligence than was attributed to him by the learned trial Judge if we are of the opinion that both doctors were negligent and, on the other hand, Dr. Matthews submits that on the facts of this case, if both himself and Dr. Porteous are found to be negligent, the respective degrees of negligence really cannot be ascertained in any logical way and that the facts therefore call for an equal apportionment. Despite the difficulties in the case, the learned trial Judge came to a conclusion on the apportionment of negligence and I am quite unable to say that such apportionment is not properly in accordance with the facts. I would not disturb it.

Nor would I disturb the award of the learned trial Judge to Mrs. Aynsley of $100,000 for general damages. The injuries to her brain have reduced her mental age to that of a seven-year-old child — permanently; accordingly, she will require lifelong care commensurate with that age; she was 32 years of age at the time of her injury and 37 at the time of trial. She has suffered and will continue for the rest of her life to suffer pain, irritability and depression; she has incurred an epileptic condition; she has lost her previous earning power, modest though it was, and obviously has lost enjoyment of life to a very large degree; she has suffered, according to the trial Judge [[1968] 1 O.R. at p. 443, 66 D.L.R. (2d) at p. 593], a "personality change and in effect has lost practically all of those things which a person might expect for the balance of

her life". In sum, these items of injury require substantial compensation. Much was sought to be made by all parties dealing with quantum concerning the proper locale of Mrs. Aynsley's institutional residence, past and future. Mrs. Aynsley has been resident in Homewood Sanitarium at Guelph. The learned trial Judge, in awarding special damages to the husband, allowed the expense of maintaining Mrs. Aynsley in that institution, but as to the future he found as follows [p. 443 O.R., p. 593 D.L.R.]:

> In dealing with the question of general damages I must, in addition to those matters previously cited, deal with the cost of future care of Elizabeth Aynsley. In setting the sum of general damages, it is my view that Mrs. Aynsley can be as well taken care of at the Ontario Hospital at Whitby as she is at Homewood Sanatorium and the cost will be substantially less.

It is submitted on behalf of Dr. Matthews that this finding is not only correct but that by reason thereof the trial Judge was in error in not fixing the husband's special damages on the same lower scale, so far as the allowance to him for his wife's past maintenance is concerned. In any event, the $100,000 is said to be excessive. On the other hand, counsel for the plaintiffs supports the trial Judge's finding on this item of the husband's special damages and urges the Court to increase Mrs. Aynsley's general damages on the ground that these should have been fixed in contemplation of Mrs. Aynsley's continued residence at Homewood.

As I have stated, I would not disturb the award to Mrs. Aynsley for general damages; I am by no means convinced that the learned trial Judge's assessment was in error. Similarly, I perceive no error in his allowance to the husband of the cost of Mrs. Aynsley's residence at Homewood up to the date of trial. Accepting his conclusion upon this point as to future care, as I do, the amount awarded in this respect for past maintenance discloses no error in principle; initially and for the past period in question, the plaintiff husband, in my view, was acting reasonably and not extravagantly in providing for his wife as he did; I think her injuries, the study of her post-accident reactions to life about her and the observation of her capacities for enjoyment of life all demanded as a reasonable requirement the perhaps more personalized care available at Homewood. I think, however, that the trial Judge inadvertently committed an error in his calculation of the special damages to the husband respecting Mrs. Aynsley's hospitalization at Homewood. In his original reasons for judgment dated July 24, 1967, he calculated the amount due for such hospitalization up to the date of trial. The daily rate at Homewood apparently was $20.50. The Ontario Hospital Services Commission paid $10 of this and the plaintiff husband was responsible for the daily balance of $10.50. On November 13, 1967, further reasons were delivered and the amount paid by the Ontario Hospital Services Commission from date of commencement of trial to September 19, 1967, was allowed in the sum of $4,711.80 and included in the judgment. The trial Judge, however, seems to have omitted, and I think he should not have omitted, to award the plaintiff husband his share of the expenses incurred for hospitalization during the period in question, that is to say, 358 days at $10.50 per day in addition to a medical charge of $25 per month for that approximate twelve-month period, making a total of $4,059. Accordingly, I would increase the amount awarded to the husband for special damages by that amount.

The plaintiff husband was awarded $25,000 for loss of *consortium* and *servitium*. This sum is also attacked as being grossly excessive. With respect to the trial Judge, I think in fact it is grossly excessive; it would seem to be more commensurate with some mathematical projection than with a realistic view of the actual circumstances and the uncertainties as to the future. I would reduce this item of damage from $25,000 to $15,000.

I now turn to the most troublesome and, as a matter of general application, by far the most important aspect of the appeal, namely, the position of the Toronto General Hospital on the facts of this case concerning the negligence of Dr. Porteous.

There would appear to be no decision either here or in England fastening liability upon a hospital for negligent performance of their duties by either physicians or nurses during the course of an operation. As will be seen there are decisions as to negligence committed by such individuals outside of the operating room; they reveal a confusing complexity of views as to the true basis of liability for such acts. For the purposes of the present appeal it will be necessary to refer to a few only of those decisions.

One should begin with the famous *Hillyer* case — in many respects the very font and origin of the jurisprudence on this subject: *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820. In that case the plaintiff brought an action against the governors of the hospital for damages for injuries alleged to have been caused to him during an operation by the negligence of the doctors or nurses or other members of the hospital staff. As was said by Lord Greene, M.R., in *Gold et al. v. Essex County Council*, [1942] 2 All E.R. 237 [at p. 240]:

> *Hillyer's* case has had a remarkable history. There can be few cases in the books which have given rise to such a diversity of judicial statement as to the precise nature of the point decided.

Of the three Judges who sat upon the case, Farwell, L.J., and Kennedy, L.J., each delivered reasoned judgments, while Cozens-Hardy, M.R., agreed that the appeal should be dismissed for the reasons contained in both judgments. The judgment of Farwell, L.J., is by far the narrower in scope, while, on the other hand, it has been said of the judgment of Kennedy, L.J., that the propositions therein propounded are far wider than was necessary for the decision of the case and should in many instances be treated as mere dicta. However that may be, the trial Judge in that case was sustained in the Court of Appeal and it was held that the only duty undertaken by a hospital towards a patient treated therein is to use due care and skill in selecting medical staff. The relationship of master and servant does not exist between the hospital and the physicians and surgeons who give their services at the hospital and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the hospital. As a result of what was said in the case, many problems arose throughout the years, particularly concerning nurses on the staff of a hospital as to the difference in legal result between acts involving professional skill and adminis-

trative acts; in some of the authorities a hospital was said to be liable for negligence committed in the latter category of acts, but not for negligence committed in the former — always excluding the situation where the injury arose in the course of an actual operation. I do not consider it helpful in the case at bar to attempt to analyse the *Hillyer* decision in detail, particularly in view of what was said about it by the Supreme Court of Canada in the *Sisters of St. Joseph of Diocese of London in Ontario v. Fleming*, [1938] S.C.R. 172, [1938] 2 D.L.R. 417. In that case the plaintiff was admitted as a patient to the defendant's hospital under a contract for board, nursing and attendance. Defendants maintained and operated for profit in the hospital an equipment for diathermic treatments. Plaintiff's physician ordered the nurse supervising the floor on which plaintiff was located to see that he was given such a treatment and the treatment was given by a nurse who was a permanent member of the hospital staff and in charge of such treatments. The plaintiff was severely burned and alleged that the burn was caused by the negligence of the nurse. He recovered upon this ground. The judgment was affirmed by this Court [[1937] O.R. 512, [1937] 2 D.L.R. 121] and the appeal from this Court to the Supreme Court of Canada was dismissed. Davis, J., who delivered the judgment of Duff, C.J., Davis, Kerwin and Hudson, JJ., after extensively reviewing the *Hillyer* case, and subsequent cases criticizing, distinguishing or limiting its application, had this to say concerning the *Hillyer* case at p. 188 S.C.R., p. 431 D.L.R.:

> The statement of Lord Justice Kennedy in *Hillyer's* case as to the difference between ministerial or administrative duties, on the one hand, and matters of professional care or skill, on the other hand, is entitled to great weight and respect, but even the decision in the case is not binding upon this Court.

And at pp. 190-1 S.C.R., p. 433 D.L.R.:

> After the most anxious consideration we have concluded that, however useful the rule stated by Lord Justice Kennedy may be in some circumstances as an element to be considered, it is a safer practice, in order to determine the character of a nurse's employment at the time of a negligence act, to focus attention upon the question whether or not in point of fact the nurse during the period of time in which she was engaged on the particular work in which the negligent act occurred was acting as an agent or servant of the hospital within the ordinary scope of her employment or was at that time outside the direction and control of the hospital and had in fact for the time being passed under the direction and control of a surgeon or physician, or even of the patient himself. It is better, we think, to approach the solution of the problem in each case by applying primarily the test of the relation of master and servant or of principal and agent to the particular work in which the nurse was engaged at the moment when the act of negligence occurred.

I respectfully adopt that principle as binding upon this Court and in the statement thereof by Davis, J., I perceive no limitation of the application of the principle to acts by a nurse outside the operating theatre or not committed by her during the course of an operation. While it well may be that a nurse is seldom, if ever, while acting in the course of an operation, to be considered for the time being as an employee of the hospital, that is a question of fact in each case and does not impinge upon the principle itself. I also conclude that by analogy, at least, the same principle applies to a physician or surgeon, not only outside of the operating room but within it and that in each case it is a question of fact to be determined whether or not the physician or surgeon, a member of the staff of the hospital and, generally speaking, an employee of that hospital is, at the time of the commission of the act complained of, an employee of the hospital or acting in a different capacity. Certainly for all that was said in the *St. Joseph* case, it is open to this Court so to decide.

Since the decision of the Supreme Court of Canada in the *Sisters of St. Joseph* case, three cases of persuasive significance have been decided in the Court of Appeal in England: *Gold et al. v. Essex County Council*, [1942] 2 All E.R. 237 (already mentioned); *Cassidy v. Ministry of Health*, [1951] 1 All E.R. 574, and *Roe v. Ministry of Health; Woolley v. Ministry of Health*, [1954] 2 All E.R. 131. The *Gold* case involved an infant plaintiff who sustained injuries while being treated by a radiographer in the employ of the hospital. The radiographer was fully competent, was held to be under a contract of service with the hospital and was held to have been negligent. The doctrine of *respondeat superior* was applied and the hospital held liable for the injuries. The editorial note to the decision is of interest and I reproduce it in full [p. 237]:

> The Court of Appeal have here critically examined the judgments in *Hillyer v. St. Bartholomew's Hospital (Governors)* and find that it is not a binding authority so far as it has been said to determine the liability of a hospital for the acts of nurses. It has been said that hospitals are not liable for the negligent acts of nurses in the course of their professional duties, but that they are liable for such acts in the course of their ministerial duties. This proposition is inconsistent with the ordinary law of the liability of a principal for the acts of a servant, for the principal is liable for negligent acts of servants whether or not those acts require the exercise of skill and special knowledge. The apparent exception in the case of a surgeon which was the actual decision in *Hillyer's* case is explained by the fact that the surgeon is not acting under a contract of service but a contract for services. Hospital nurses will in practically every case be under a contract of service and the hospital authority is now held to be liable for their negligence both in the case of professional and ministerial acts. The servant of the hospital in the present case was a radiographer, but it is agreed by everyone that in law his position was the same as that of a nurse. The matter seems likely to go to the House of Lords and it is unnecessary to say more on the subject at the moment except that the position of a resident doctor at a hospital is left open for future decision.

In that case Greene, M.R., thought that the first task in each case of the kind under consideration is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered he says [p. 242]:

> ...it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf; and this is equally true whether or not the obligation involves the use of skill . . . and it is no answer to say that the obligation is one which on the face of it they [the hospital authorities] could never perform themselves.

As to physicians and surgeons, he had this to say [p. 242]:

> So far as consulting physicians and surgeons are concerned, clearly the nature of their work and the relationship in which they stand to the respondents [*i.e.*, the hospital] precludes the drawing of an inference that the respondents undertake responsibility for their negligent acts. The same may be true of the house physicians and surgeons, but their case is not relevant to the present inquiry and I say nothing about it.

MacKinnon, L.J., sets out four principles governing the determination of liability [p. 244]:

> Apart from authority, I should think the legal principles to be applied were as follows. (i) One who employs a servant is liable to another person if the servant does an act within the scope of his employment so negligently as to injure that other. This is the rule of *respondeat superior*. (ii) That principle applies even though the work which the servant is employed to do is of a skilful or technical character, as to the method of performing which the employer is himself ignorant; for example, a shipowner and the certified captain who navigates his ship. (iii) The liability of the master for the negligent act of the servant will exist, though at the time the servant is, by direction of the master, or by operation of law, under the control of some third party, for example, when the captain of a ship is under the commands of a naval commodore in charge of a convoy. (iv) The master will not be liable for the act of his servant if he is only doing, without personal negligence, that which he is directed to do by such third party. An example is when a captain by command of the commodore goes at eight knots in a

> dense fog. His employer is not liable for a resulting collision, since the servant is not negligent, and, if anyone is negligent, it is the commodore for whose acts the shipowner is not liable.
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> Applying these principles to this case, I should hold that Mead was clearly the servant of the defendants, and that when applying the Grenz rays to the plaintiff he was acting for them in the scope of his employment. Under the second proposition he would render the defendants liable for his negligence in that task, though his work involved the exercise of skill on his part. Under the third proposition they would still be liable, if he did the work negligently, though he was at the time doing it by the orders of Dr. Burrows. Under the fourth proposition, if he was only doing what Dr. Burrows told him to do, and as he told him to do it, the defendants would not be liable. For Mead would not be negligent, while Dr. Burrows would. The plaintiff could then recover only if Dr. Burrows was the servant of the defendants.

Goddard, L.J., thought the defendants liable on the ground that the radiographer, Mead, was under a contract of service with the hospital as distinguished from a contract for services; hence, *respondeat superior* applied to render the hospital liable for the negligence of Mead. His view of the matter was that if the negligent person were under a contract of service to the hospital, then the hospital would be liable for the person's negligence if the negligent act was done [p. 249] "in the theatre or at the bedside" provided, of course, that in the particular circumstances of the case the person had not become the agent of another.

As to the *Hillyer* case, Goddard, L.J., comments [pp. 249-50]:

> The difference in reasoning between Farwell, L.J., and Kennedy, L.J., makes it difficult to say what the *ratio decidendi* of *Hillyer's* case is, nor has this been elucidated by the many comments on that decision in subsequent cases. Its correctness has been expressly left open by the House of Lords . . .

Finally, Lord Goddard makes it clear that he was not considering the situation of doctors on the permanent staff of the hospital [p. 250]:

> I desire, however, to say that for the purpose of this judgment I am not considering the case of doctors on the permanent staff of the hospital. Whether the authority [i.e. the hospital] would be liable for their negligence depends, in my opinion, on whether there is a contract of service, and that must depend on the facts of any particular case.

In the *Cassidy* case the plaintiff, who was suffering from a contraction of the third and fourth fingers of his left hand, was operated on at the defendant's hospital by Dr. Fahrni, a whole-time assistant medical officer of the hospital. Dr. Fahrni was a Canadian, who graduated in Canada in 1940. In 1941 he joined the Canadian Army and went to England in 1942 or early 1943. He had, at the time of the operation in question, specialized to a considerable extent in orthopaedic surgery in military hospitals and elsewhere, and had received the degree of Fellow of the Royal College of Surgeons, Edinburgh. After the operation, the plaintiff's hand and forearm were bandaged to a splint for some 14 days. During this time, despite complaints of pain from the plaintiff, no action was taken by the doctor, or by the house surgeon who attended to the plaintiff in the absence of Dr. Fahrni. Both doctors were employed by the hospital under contracts of service. On removal of the bandages it was discovered that all four fingers of the plaintiff's hand were stiff and the hand practically useless. The plaintiff recovered against the defendant hospital for negligence in the post-operational treatment which he had received; his action had been dismissed by the trial Judge but the judgment was reversed unanimously in the Court of

Appeal. Denning, L.J., as he then was, expressed surprise that the question of liability had posed such a problem throughout the years and was of the opinion that the liability of hospital authorities for the negligence of a doctor on the permanent staff of a hospital depends not on whether the doctor is employed under a contract of service or under a contract for services, but solely on the question of who employs him. Hence in his view, a hospital is liable for the negligent act of the doctor, be he a consultant or not, if he is employed not by the patient but by the hospital itself. Neither of the other Justices deciding the appeal went that far. Somervell, L.J., summarizes the position of Dr. Fahrni and the liability of the hospital for his negligence as follows [pp. 578-9]:

> The evidence as to Dr. Fahrni's position in the present case is that he was an assistant medical officer, that he received a sum in lieu of residential emoluments, which indicates that, if there had been accommodation, or, perhaps, if he had been a bachelor, he would have lived in, and that he was employed whole time. His engagement was subject to the standing orders of the council, but these are not before us. Dr. Ronaldson was a house surgeon working under Dr. Fahrni. The first question is whether the principles as laid down in *Gold's* case cover them. In considering this, it is important to bear in mind that nurses are qualified professional persons. It is also important to remember, and MacKinnon, L.J., emphasised this, that the principle of *respondeat superior* is not ousted by the fact that a "servant" has to do work of a skilful or technical character, for which the servant has special qualifications. He instanced the certified captain who navigates a ship. On the facts as I have stated them, I would have said that both Dr. Fahrni and Dr. Ronaldson had contracts of service. They were employed like the nurses as part of the permanent staff of the hospital. Lord Greene, M.R., in *Gold's* case, in considering what a patient is entitled to expect when he knocks at the door of the hospital, comes to the conclusion that he is entitled to expect nursing, and, therefore, the hospital is liable if a nurse is negligent. It seems to me the same must apply in the case of the permanent medical staff. A familiar example is an out-patient's ward. One may suppose a doctor and a sister dealing with the patients. It seems to me the patient is as much entitled to expect medical treatment as nursing from those who are the servants of the hospital. I agree that, if he is treated by someone who is a visiting or consulting surgeon or physician, he is being treated by someone who is not a servant of the hospital.

Singleton, L.J., obviously was not treating an incident which happened in the operating theatre in the course of an operation and one is left to speculate as to what his decision might have been had such been the case since one observation made by him perhaps throws the matter open to doubt. In referring to Dr. Fahrni and pointing out that he was a servant of the hospital for whose acts the hospital was responsible, he made the following observation [pp. 581-2]:

> No doubt, the corporation [*ie.*, the hospital] could not interfere with him in the operating theatre even if they had wished to do so, but I know of nothing to prevent them making rules as to visiting, or seeing, patients after an operation, or as to the passing on of information or of complaints, or as to what should be done if the surgeon is absent.
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> It is, I think, of first importance to remember that the court in that case [*i.e.*, *Hillyer's* case] was dealing with something which happened in the operating theatre when the consulting surgeon was in charge. The court did not decide that hospital authorities can never be responsible for the negligence of a doctor.

Finally, in regard to post-operative treatment and nursing, Somervell, L.J., found himself unable to draw a distinction between Dr. Fahrni, on the one hand, and Dr. Ronaldson or a nursing sister, on the other, all of them being regarded as skilled persons.

In the *Roe* case, [1954] 2 All E.R. 131, the plaintiffs underwent a surgical operation in hospital. Before the operation in each case a spinal anaesthetic of nupercaine was administered by one of the defendants, a specialist anaesthetist. The nupercaine had become contaminated and the plaintiffs suffered grave injuries. The nupercaine contained in glass ampoules had been immersed in a phenol solution which had percolated into the nupercaine through molecular flaws or invisible cracks in the ampoules, a possibility not appreciated by competent anaesthetists in general at the time of the operations. The actions were dismissed against both the anaesthetists and the hospital since the plaintiffs had been unable to establish negligence on the part of anyone having to do with the operations. The Court held, however, that the anaesthetist was the servant or agent of the hospital which was therefore responsible for his acts. Singleton, L.J., considered the anaesthetist to be (there were really two who alternated in the work) a member of the hospital's permanent staff and therefore in the same position as the orthopaedic surgeon in the *Cassidy* case. The facts as to the anaesthetist were: In October, 1946, he (*i.e.*, Dr. Graham) was, with Dr. Pooler who had taken his diploma of anaesthesia some years earlier, appointed as a visiting anaesthetist to the hospital. He and Dr. Pooler between them were under obligation to provide a regular anaesthetic service for the hospital, it being left to them to decide how to divide up the work. In fact, apart from emergencies, they worked at the hospital on alternate days. The hospital set aside a sum of money out of their funds derived from investments, contributions and donations for division among the whole of the medical and surgical staff including visiting and consulting surgeons as the participants might decide. Dr. Graham participated in this fund but otherwise received no remuneration from the hospital. He was at all times allowed to continue his private anaesthetic practice.

Denning, L.J., thought the hospital authorities responsible for the whole of their staff, not only for the nurses and doctors but also for the anaesthetists and the surgeons and whether permanent or temporary, resident or visiting, whole-time or part-time — this on the ground that even if they are not servants of the hospital, they are its agents to give treatment.

Morris, L.J., for similar reasons came to the same conclusion.

The cases under review both in this country and in England make it clear, I think, that the liability of a hospital for the negligent acts or omissions of an employee vis-à-vis a patient, depends primarily upon the particular facts of the case, that is to say, the services which the hospital undertakes to provide and the relationship of the physician and surgeon to the hospital. The introduction into England of nationalized medicine probably has greatly altered the factual situation in that country with respect to the inquiries I have just mentioned, but each case there, I take it, will turn upon its particular facts. Similarly, I think in Ontario vicarious liability will be driven home to the hospital or plaintiffs will fail in that attempt, depending upon the peculiar facts of each case.

In this regard, I cannot refrain from observing that the more modern cases in England at the appellate level would seem to be drawing ever nearer to the principle, so far as nurses are concerned, enunciated in the Supreme Court of Canada in the *St. Joseph* case and, as I have already said, in my view it is open to this Court to apply those principles expressed as to nurses, to physicians and even to physicians in the operating theatre.

What then was the relationship between Dr. Porteous and the hospital? Dr. Porteous, as has been noted already, was a highly skilled, trained anaesthetist — a specialist with several years experience in this his chosen line of work. As such he was a full-time member of the hospital staff, paid by the hospital, and assigned by the hospital to assist from time to time consulting anaesthetists in the operating rooms of the hospital. The equipment was supplied by the hospital and a charge was made to the patient for the use of the operating room; in other words, the hospital undertook to furnish to the patient as part of the hospital service an operating theatre, the required equipment in good order and the services free from negligence of a properly qualified assistant to the patient's anaesthetist. A perusal of the medical evidence makes it abundantly clear that in the type of operation under review the safety of the patient and the success of the operation required the participation of two anaesthetists; it was of necessity a team effort; each anaesthetist had many tasks to attend to individually and concurrently with the other anaesthetist. While the senior, Dr. Matthews, was in charge and control in the sense that he could and did either assign or decide upon the division of the work, he could not and did not control everything Porteous was required to do or his manner of doing it; each of them of necessity acted in many tasks on his own responsibility and judgment. One such task, it is plain, was the manometer end of the calibrating procedure attended to by Dr. Porteous in the operating theatre proper while Dr. Matthews, in another room, "calibrated" the monitor. The negligence of Dr. Porteous, in my view, was a failure by the hospital staff itself to discharge efficiently its undertaking to the patient and I would allow the judgment against the hospital to stand; he was, I think, under a contract of service with the hospital but, in my view, the legal result would be the same if his had been a contract for services. In addition to what I have already said on this subject, I wish to concur in the following observations taken from the reasons for judgment of the learned trial Judge [[1968] 1 O.R. at pp. 439-41, 66 D.L.R. (2d) at pp. 589-91]:

> Dr. Porteous was . . . a highly skilled trained anaesthetist who was assisting Dr. Matthews in the necessary calibrating of the monitor. While under the orders of Dr. Matthews, he was to carry out these orders in a manner consistent with his training. . . . Since, in my view, he was an employee of the hospital and supplied as part of its services to the patient, even though under the direction of Dr. Matthews, I hold that the hospital is vicariously liable for his negligence.
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> In the case in question, Dr. Porteous was directed by Dr. Matthews to assist in calibrating the machine, but it was in the pumping of the manometer as part of his duties as an assistant anaesthetist employed by the hospital that Dr. Porteous was negligent and this was done while Dr. Matthews was in the next room.
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> . . . . .
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> In the instant case, however, Dr. Porteous was obviously expected to use his training and abilities aside from following direct orders of Dr. Matthews. Since the calibration required Dr. Matthews to be out of the room and out of view of the actions of Dr. Porteous at the time he, Dr. Porteous, pumped the manometer, it appears clear to me that Dr. Porteous would be expected to use professional skill in the manner in which the manometer was pumped. This, in my view, he failed to do and as a permanent employee of the hospital, the hospital is vicariously liable for his negligence.

In the result, I would: allow the appeal of Dr. Matthews and of the hospital to the extent of directing a net reduction of $5,941 in the damages awarded to the plaintiff husband, but in all other respects would dismiss those appeals with costs payable to the respondent plaintiffs: dismiss the cross-appeal of the respondent plaintiffs with costs to the hospital and to Dr. Matthews and would make no other order as to costs.

Judgment accordingly.

Affirmed sub. nom. Trustees of Toronto General Hospital v. Aynsley [1970], 70 D.L.R. (3d) 241 (S.C.C.)

CO-OPERATOR'S INS. ASSN. v. KEARNEY (1964), 48 D.L.R. (2d) 1 (S.C.C.)

CARTWRIGHT, J. (dissenting):—The relevant facts out of which this appeal arises and the conclusions arrived at in the Courts below are set out in the reasons of my brother Ritchie and those of my brother Spence. The questions of difficulty are not as to the facts but as to the law.

The following facts are undisputed. The respondent suffered serious injuries when the automobile in which he was riding collided with a train. The automobile was owned by the appellant and was being driven with its consent by its employee Livesey. The collision was caused solely by the negligent driving of Livesey.

The Courts below have proceeded on the view that at the moment of the collision Kearney and Livesey were fellow-servants of the appellant and acting in the course of their employment as such servants. For the purposes of this appeal, I accept the view that at the time mentioned, Livesey was a servant of the appellant and acting in the course of his employment. Counsel for the appellant argues that the relationship between the appellant and Kearney was not that of master and servant at any time and alternatively that if it did exist while Kearney was engaged in assisting Livesey to adjust the policy-holder's claim it had terminated, before the occurrence of the collision, when Kearney had done everything that was required of him by the appellant and was free and anxious to return to his office to deal with the real estate transaction which was awaiting his attention. There appears to me to be great force in the argument but for the purposes of this appeal I will assume, without deciding, that the contrary view taken by the Courts below is correct.

The judgments below are founded upon the judgment of the Court of Appeal for Ontario in *Harrison v. Toronto Motor Car Ltd. and Krug*, [1945] 1 D.L.R. 286, [1945] O.R. 1. In this Court counsel for the appellant submitted that the *Harrison* case was wrongly decided and alternatively that the case at bar can be distinguished from it on the facts.

The *Harrison* case dealt with the predecessor of s. 50 of the *Highway Traffic Act*, R.S.O. 1950, c. 167, which was in force at the date when Kearney was injured and which is now s. 105 of R.S.O. 1960, c. 172. Section 50 read as follows:

> 50(1) The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner shall be liable to the same extent as the owner.
>
> (2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

Neither in the *Harrison* case nor in the case at bar was the automobile in which the injured passenger was being carried "a vehicle operated in the business of carrying passengers for compensation" and we are not concerned with the numerous decisions in which the scope and meaning of that phrase have been considered.

At common law the driver of an automobile owes a duty to a passenger being carried gratuitously in the automobile to use reasonable care for his safety and if as a result of negligent driving the passenger is injured the driver is liable to him for the damages suffered. If the automobile belongs to someone other than the driver that person is not liable at common law merely because he is the owner; his liability, if it exists, must be found in a relationship between him and the driver which renders him liable for the latter's negligence or in a relationship between the owner and the passenger which imposes on the former a duty to take care for the safety of the latter.

Subsection (1) of s. 50 of the *Highway Traffic Act* subjects the owner to liability, which did not exist at common law, if his automobile is being driven with his consent; that liability is "for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway". The foundation of this statutory liability is negligence in the operation of the automobile. The effect of s-s. (2) which was enacted after s-s. (1) had been in force for about five years, was to provide, subject to the exception with which we are not concerned, that neither the owner nor the driver should be liable for loss resulting from bodily injury to or the death of a passenger caused by negligence in operating the automobile. If the words of the subsection are plain and unequivocal the Courts must give effect to them although they bring about what, in the eyes of the common law appears to be a grave injustice.

In the *Harrison* case, the defendant Krug, who was in poor health, decided to go on a long motor trip. He employed the plaintiff Miss Harrison to accompany him as a nurse on that trip. The car was owned by Krug and driven by one McKenzie who was held to be Krug's servant. Miss Harrison was injured in a collision caused solely by the negligent driving of McKenzie. It was held by the Court of Appeal (i) that although the predecessor of s. 50(2) relieved Krug from liability *qua* owner it did not relieve him from liability *qua* employer, (ii) that Krug as employer owed a duty (the precise nature of which is not discussed) to Miss Harrison, (iii) that this duty was breached by the negligent driving of McKenzie, (iv) that the defence rested on the doctrine of common employment was not available to Krug, and (v) that consequently Krug was liable.

I agree with the conclusion of my brother Spence that, on the assumption I have made above as to the relationship of the parties at the time of the collision, the appellant is deprived of the defence of common employment by the terms of ss. 124 and 125 of the *Workmen's Compensation Act*, R.S.O. 1960, c. 437. The relevant wording of those sections as applicable to the facts with which we are dealing are as follows:

> 121(1) Where personal injury is caused to a workman [in this case Kearney] by reason of the negligence of . . . any person [in this case Livesey] in the service of his employer [in this case the appellant] acting within the scope of his employment, the workman . . . is entitled to recover from the employer the damages sustained by the workman by or in consequence of the injury. . .
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> 125(1) A workman shall be deemed not to have undertaken the risks due to the negligence of his fellow workmen. . .

The effect of these sections is to deprive the employer of a defence which was available to him at common law and to render him liable to his injured employee for the negligence of another of his servants acting within the scope of his employment to the same extent as he would have been liable to a person who was not employed by him but not to any greater extent. The foundation of his liability is the negligence of his servant who has caused the injury.

Assuming, as I do, for the purposes of this appeal that Kearney and Livesey, at the moment of the collision, were fellow-servants of the appellant and acting in the course of their employment as such servants, it is clear that but for the provisions of s. 50(2) both Livesey and the appellant would be liable to Kearney. Counsel for the respondent, rightly in my opinion, took the position in the Court of Appeal

a liability is expressly negatived by s. 50(2). It is argued, however, that although the liability for the injury caused directly and solely by Livesey's negligence is taken away as against him the result is that, while Livesey cannot be sued, the liability remains and can be enforced against the appellant. If this was decided in the *Harrison* case then, in my respectful opinion, that decision was wrong and ought not to be followed.

The error in the reasoning in the *Harrison* case arose, in part at least, from considering the effect of the words in s. 50(2) relieving the owner from liability rather than the effect of the words relieving the driver from liability. Gillanders, J.A., said at pp. 293-4 D.L.R., p. 13 O.R.:

> The provisions now being considered being directed to the liability of the owner and driver should be restricted to their liability *qua* owner and *qua* driver, and I think may not bar a right of action due to some other relationship. If the appellant has a cause of action against her master by reason of the negligence of his servant, s-s. (2) does not take it away even though at the time it arose she was being carried in her employer's motor vehicle.

He does not appear to me to have given adequate consideration to the effect upon the liability of the employer, as such, of the act of the Legislature doing away with all liability of his employee.

In my view the effect of s. 50(2) is not merely to afford a personal or procedural defence to the driver but to take away the passenger's right of action founded upon the driver's negligence. I am unable to impute to the Legislature the intention to free from liability the one person whose negligence was *fons et origo mali* and at the same time to impose liability upon those, morally innocent of any wrongdoing, who would have been required to answer vicariously for the driver's negligence had he remained liable.

Such cases as *Smith v. Moss et al.*, [1940] 1 K.B. 424 and *Broom v. Morgan*, [1953] 1 Q.B. 597, do not appear to me to assist the respondent. They were cases in which a particular personal relationship prevented the injured person from suing the individual driver. The nature of the immunity possessed by the driver was described by Denning, L.J., in the last-mentioned case in the passage from his judgment (at pp. 609-10] quoted in the reasons of my brother Ritchie [*post*, p. 14]:

> It is an immunity from suit and not an immunity from duty or liability. He is liable to his wife, though his liability is not enforceable by action; and, as he is liable, so also is his employer, but with this difference, that the employer's liability is enforceable by action.

This may be contrasted with the terms of s. 50(2) whereby it is liability which is expressly negatived.

In *Dyer et ux. v. Munday et al.*, [1895] 1 Q.B. 742, both the servant and his employer were originally liable to the plaintiff for the damages caused by the assault committed by the servant. The conviction of the servant for common assault merely provided him with a personal defence.

Some assistance in arriving at the intention of the Legislature may be derived from considering what is now s. 2(2) of the *Negligence Act*, R.S.O. 1960, c. 261. This reads as follows:

> 2(2) In any action brought for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from a motor vehicle other than a vehicle operated in the business of carrying passengers for compensation, and the owner or driver of the motor vehicle that the injured or deceased person was being carried in, or upon or entering, or getting on to, or alighting from is one of the persons found to be at fault or negligent, no damages are, and no contribution or indemnity is, recoverable for the portion of the loss or damage caused by the fault or negligence of such owner or driver, and the portion of the loss or damage so caused by the fault or negligence of such owner or driver shall be determined although such owner or driver is not a party to the action.

This subsection was first enacted by Statutes of Ontario, 1935, c. 46, s. 2(2) which received Royal Assent on the same day as c. 26 of the same statutes, by s. 11 of which the predecessor of s-s. (2) of s. 50 of the *Highway Traffic Act*, R.S.O. 1950, c. 167, was first enacted.

The two provisions are clearly *in pari materia*. The terms of s. 2(2) of the *Negligence Act* appear to me to indicate an intention on the part of the Legislature, for all purposes of determining whether liability exists, to identify a passenger who is being carried gratuitously with the negligent driver of the vehicle in which he is being carried. It appears to me improbable that the Legislature would intend that such identification should operate to the advantage of a wrongdoer whose negligence in driving another car is one of the causes of the passenger's injuries but not to the advantage of the employer of the driver of the car in which the passenger is riding when such employer is morally free from any blame.

Where the only breach of the duty to take care for the safety of the passenger, whether owed by the driver or the employer of the driver or the employer of the passenger, consists of negligent driving on the part of the driver and liability to the passenger for that negligence is negatived (not because of some personal immunity from suit possessed by the driver because of a particular relationship such as that of husband and wife existing between the passenger and the driver but by an express statutory provision applying to the case of every passenger who is being carried gratuitously) the passenger's right of action is gone because the negligent act, liability for which is negatived, is as much an essential part of the passenger's cause of action against his own employer and of his cause of action against the employer of the driver as it is of his cause of action against the driver.

If the judgments below are upheld it appears to me that the plain purpose of s. 50(2) will be defeated as the appellant will be entitled to sue Livesey for indemnity in respect of the damages it is required to pay to Kearney. Such a right of indemnity appears to me to be recognized by the decision of the Court of Appeal for Ontario in *McFee v. Joss*, [1925] 2 D.L.R. 1059, 56 O.L.R. 578 and in that of the House of Lords in *Lister v. Romford Ice & Cold Storage Co.*, [1957] A.C. 555. As the question of the existence of a right of indemnity does not arise directly on this appeal I refrain from examining the other relevant authorities. A number of them are examined and discussed in an article ["Vicarious Liability and the Master's Indemnity"] by Glanville Williams in 20 Modern Law Rev., pp. 220 and 437 (1957).

It is interesting to speculate on the result which would flow from this Court upholding the rule laid down in the *Harrison* case if a case where the facts are similar should arise in a Province where the right of recovery of a passenger who is being carried gratuitously is not taken away al-

together but is limited to cases in which the driver is guilty of gross negligence. Suppose it is found as a fact that the driver was negligent but not grossly negligent, the result presumably would be that the injured passenger could recover from his employer who is also the driver's employer but not from the driver, and the employer in turn could recover indemnity from the driver. In my respectful view we should not uphold a rule which brings about such anomalous results.

As, for the reasons given above, I agree with the submission of appellant's counsel that the *Harrison* case was wrongly decided and that the right of action which the respondent had at common law is taken away by the terms of s. 50(2) it becomes unnecessary for me to consider the question, so fully argued before us, whether the case at bar can be distinguished on its facts from the *Harrison* case.

I would allow the appeal, set aside the judgments below and direct that judgment be entered dismissing the respondent's action. I agree with my brother Ritchie that having regard to all the circumstances there should be no order as to costs in any Court.

SPENCE, J.:—This is an appeal from the judgment of the Court of Appeal for Ontario given on September 11, 1963 [41 D.L.R.(2d) 196, [1964] 1 O.R. 101], which dismissed the appeal [of the appellant Association] from the judgment of Haines, J., given on February 25, 1963 [38 D.L.R.(2d) 290, [1963] 2 O.R. 1] whereby he awarded damages of $16,800 in favour of the plaintiff.

The following questions arose and must be answered for the determination of the judgment herein:

1. Was the finding of the learned trial Judge that at the time of the accident the plaintiff Kearney was in a position where the defendant and its servants, including Livesey, owed to him a duty to carry him with due care correct? Haines, J., at trial [38 D.L.R.(2d) at p. 294, [1963] 2 O.R. at p. 5], found the plaintiff was in such a position, and continued:

> If, however, it is necessary to put a label on the relationship, I find that for the limited purpose of adjusting the loss there was a master and servant relationship.

2. Alternatively, was there a liability upon the appellant on the basis that Livesey was the appellant's servant no matter whether the plaintiff was or was not such servant or was s. 50(2) of the *Highway Traffic Act*, R.S.O. 1950, c. 167, intended to take away the action of a gratuitous passenger against the master for the negligence of the servant? This alternative need only be considered if it is determined that the plaintiff was not in a position where he could require that he be carried with reasonable care, *i.e.*, if proposition number 1 were decided against the plaintiff.

3. Has the plaintiff an independent cause of action under s. 124 of the *Workmen's Compensation Act*, which independent cause of action was not barred by the provisions of the *Highway Traffic Act*?

Proposition one entails a finding that Kearney was a servant of the appellant and that *Harrison v. Toronto Motor Car Ltd. and Krug*, [1945] 1 D.L.R. 286, [1945] O.R. 1, was correctly decided. I am of the opinion that the finding that

Kearney was a servant is very largely a finding of fact and a finding of fact which the trial Judge expressly made upon what he described as conflicting evidence. That finding has been expressly approved by Aylesworth, J.A., in his reasons in the Court of Appeal. Counsel for the appellant in this Court sought to avoid the effect of concurrent findings of fact below by purporting to put his case only on the evidence given by the plaintiff Kearney and by those witnesses called on his behalf. This still does not lessen the invulnerability of the finding of fact, which may be determined by a trial Judge's scrutiny of a witness's testimony and particularly his testimony on cross-examination, so that the trial Judge considering evidence as a whole comes to his opinion as to the facts and inferences which should be drawn from that testimony. In so far as the proposition entailed the finding of law, I am in agreement that the test of whether a master and servant relationship existed has been rightly put in many cases, and may be taken from 25 Hals., 3rd. ed., p. 452:

> In general the distinction between a contract of service and a contract for work and labour or for service is similar to that which exists between a contract of service and a contract of agency, namely, that in the case of a contract of service the master not only directs what work is to be done but also controls the manner of doing it, whereas, in the case of a contract for work and labour or a contract for services, the employer is entitled to direct what work is to be done but not to control the manner of doing it.

The evidence established that Kearney was an insurance agent employed by the appellant under a contract which contract was filed as ex. 2. Paragraph 6 of that contract provided that the agents agreed "to service policy-holders satisfactorily and to report to home office promptly any new information affecting the desirability of a risk". The evidence established that, probably under the direction and insistence of the former district manager Lang, the plaintiff and others under contract as agents with the appellant company were constantly required to attend policy-holders, discuss with them the settlement of claims, and as to certain types of claims actually adjusting the losses themselves. It is true that the plaintiff and other agents of the appellant company were insurance agents holding licence under the *Insurance Act*, R.S.O. 1950, c. 183, and that various sections of that Act entitled persons so licensed to "carry on business in good faith as an insurance agent" but I am of the opinion that a person holding such licence may none the less at any rate on a specific occasion and for a specific purpose become the servant of the insurance company. It is also true that Aylesworth, J.A., in *Baldwin et al., McKinney et al., McLaren et al. v. Lyons and Erin District High School Board*, 29 D.L.R. (2d) 290 at p. 294, [1961] O.R. 687 at p. 691 [affd 36 D.L.R.(2d) 244] said:

> It is quite clear, I think, and indeed no one has made any submission to the contrary, that so far as this agreement is concerned, the position of Lyons was that of an independent contractor. In my view, therefore, it would require cogent and unequivocal evidence to demonstrate that the parties in fact changed that relationship into one of master and servant.

It must be remembered that the plaintiff, when Livesey, the acting district manager of the appellant company, attended his office in Meaford and requested the plaintiff to accompany him to interview the policy-holders, demurred pointing out that he was expecting to be engaged in some transactions in reference to his business as real estate agent. Livesey insisted, however, and the plaintiff not only accompanied Livesey to the policy-holder's place of work but then accompanied

Livesey and the said policy-holder to the garage where the automotive vehicle, the subject of the claim, had been taken, there remained present during the interview between Livesey and the garage keeper, then returned with Livesey and the policy-holder to the latter's place of work and there obtained from the policy-holder his proof of loss.

Before the Court of Appeal, it was evidently argued that upon the latter duty having been completed, the service, if any, ceased and that therefore the plaintiff was not in the course of employment when he was injured as he was driven back to his own place of business. Aylesworth, J.A., in his reasons, said (41 D.L.R.(2d) at p. 197, [1964] 1 O.R. at p. 102):

> . . . he had been transported to the place where the work of adjustment occurred in the car of the defendant Livesey and for the very purpose of engaging in that endeavour; he was entitled as part of their joint work as employees of the other defendant, to be returned in the same vehicle to the place whence he came; his employment in that endeavour continued, in our view, until that had been done.

I agree with that statement.

In this Court, it was argued that the plaintiff was not a servant because he could have performed his task of servicing the policy-holder in reference to the adjustment by driving his own automobile. I am of the opinion that the evidence refutes that suggestion. The district manager Livesey did not know where the policy-holder's place of work was situated and had not met the policy-holder. For the plaintiff to use his own automobile would have entailed the silly performance of two cars being driven down the odd few blocks to that place of work, one containing the district manager and the other containing the plaintiff who was to introduce the policy-holder to the district manager. Similarly, as the same two men left that factory and proceeded to the garage, with whom was the policy-holder to ride, the district manager whom he did not know, or the plaintiff whom he did know? I am of the opinion that the procedure of riding in the automobile driven by the district manager was the efficient way by which the plaintiff could carry out the duties which the district manager then and there directed him to carry out and that it was intended by the district manager that the said duties should be so carried out.

Fleming in his valuable text on the *Law of Torts*, 2nd ed., pp. 328-9, states:

> Under the pressure of novel situations, the courts have become increasingly aware of the strain on the traditional formulation
>
> [of the control test], and most recent cases display a discernible tendency to replace it by something like an "organization" test. Was the alleged servant part of his employer's organization? Was his work subject to co-ordinational control as to "where" and "when" rather than the "how"? [citing Lord Denning in *Stevenson, Jordon & Harrison Ltd. v. Macdonald*, [1952] 1 T.L.R. 101, 111.]

Applying such an organizational test to the present case, it is noted that Haines, J., in his reasons for judgment said (38 D.L.R.(2d) at p. 292, [1963] 2 O.R. at p. 3):

> Exhibit 8 is a selection of correspondence collected recently by the plaintiff. While it is written after the accident, it indicates that in dealing with the policy-holders the company referred to the plaintiff from time to time as "our Meaford area representative Bert Kearney" and "your C.I.A. representative", "your C.I.A. field underwriter Bert Kearney". No significance can be attached to the fact that these letters were written concerning claims several years after the accident. Prior to the accident the plaintiff did not have a stenographer and the company files which would contain similar correspondence have been closed long since. The plaintiff says that he has always been held out by the company in this manner and I accept his evidence.

In short, the respondent was part of the appellant's organization: his work was subject to co-ordination control as to "where" and "when" and in the case of the present action, as to "how".

For these reasons, I do not believe that the finding of fact made by the learned trial Judge and affirmed in the Court of Appeal, that at the time of the accident the plaintiff-respondent was, for the limited purpose and on the limited occasion, the servant of the appellant insurance company, should be disturbed. The fact that the respondent was a servant of the appellant, in my view, on the particular occasion while in other circumstances he may well have been an independent contractor is not fatal to his claim. *Fleming, op. cit.*, says at p. 328: "The employment of a servant may be limited to a particular occasion or extend over a long period; it may even be gratuitous." See *Smith v. Moss*, [1940] 1 K.B. 424, to which further reference will be made hereafter.

The respondent certainly was injured by the negligence of his fellow-servant Livesey, both being in the course of their employment at the time.

Section 50 of the *Highway Traffic Act*, R.S.O. 1950, c. 167, provided:

> 50(1) The owner of a motor vehicle shall be liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner shall be liable to the same extent as the owner.
>
> (2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, shall not be liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

It was argued at trial, in the Court of Appeal, and in this Court, that s. 50(2) barred the right of the plaintiff-respondent to recover. Certainly, the vehicle was not "operated in the business of carrying passengers for compensation". Then under the words of the section, it would appear that neither the owner nor the driver of the motor vehicle was liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in or upon or getting onto or alighting from the motor vehicle. However, in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, the Court of Appeal for Ontario considered a claim by a servant, Harrison, for damages caused to her when injured in the course of her employment riding with her employer Krug in an automobile driven by his employee McKenzie, due to the negligence of the said McKenzie. The same statutory provision, then s. 47(2), R.S.O. 1937, c. 288, was urged in defence. Gillanders, J.A., giving the judgment of the Court, said at p. 291 D.L.R., p. 10 O.R.:

> The contention that, in any event, the subsection is only intended to relieve the owner *qua* owner, from the statutory limits imposed by s-s. (1) is a much more substantial contention.

And at pp. 293-4 D.L.R., p. 13 O.R., after examining the defence carefully, said:

> The provisions now being considered being directed to the liability of the owner and driver should be restricted to their liability *qua* owner and *qua* driver, and I think may not bar a right of action due to some other relationship. If the appellant has a cause of action against her master by reason of the negligence of his servant, s-s. (2) does not take it away even though at the time it arose she was being carried in her employer's motor vehicle.

The decision awarding Miss Harrison damages against her employer has been followed in the Courts of Ontario since that date. In the meantime, the section was re-enacted in 1950 as s. 50 and in 1960 as s. 105. It is true that the *Interpretation Act*, R.S.O. 1950, c. 184, s. 19, provided:

> 19. The Legislature shall not, by re-enacting an Act, or by revising, consolidating or amending the same, be deemed to have adopted the construction which has by judicial decision or otherwise, been placed upon the language used in such Act or upon similar language.

But in *Cowper et al. v. Studer et al.*, [1951] 2 D.L.R. 81, [1951] S.C.R. 450, where a like provision of the Saskatchewan *Interpretation Act* was considered, it was held that it merely removed the presumption that existed at common law and that in a proper case it will be held that the Legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it. It cannot be doubted that the effect of the decision in *Harrison v. Toronto Motor Car Ltd. and Krug* was known to every lawyer and to every Judge in the Province of Ontario from the date of its decision on and it is difficult to understand how the frequent statutory amendments to the *Highway Traffic Act* between 1945 and the present date and the re-enactment of the very section in identical words in both the revisions of 1950 and 1960 would have occurred if the decision in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, has not represented the intention of the Legislature. The case has been cited and either adopted or distinguished in many judgments at trial and in the Court of Appeal. I am, therefore, of the opinion that this Court is entitled to consider the fact that the decision has remained unchallenged for 19 years and that the legislative provisions upon which it depends have been twice re-enacted in considering whether the decision is incorrect.

Counsel for the appellant argued that the decision is contrary to that of the Court of Appeal itself in *Hughes v. J. H. Watkins & Co.*, [1928] 2 D.L.R. 176, 61 O.L.R. 587, and the decision of this Court in *Dufferin Paving & Crushed Stone Ltd. v. Anger and Derbyshire*, [1940] 1 D.L.R. 1, [1940] S.C.R. 174. Gillanders, J.A., considered that exact argument. Both of those decisions were decisions holding that the limitation section in the *Highway Traffic Act* applied generally and would bar an action in the case of *Hughes v. J. H. Watkins & Co.* by a pedestrian brought after the limitation period, and in the case of *Dufferin Paving et al. v. Anger* by a land owner whose property had been damaged by the vibration caused by the driving of trucks. Both of those decisions turned on the words of the limitation section, and are not decisions which require a general and all-inclusive effect to be given to the provisions of s. 50(2) of the *Highway Traffic Act* as it existed in 1957 and it still exists. I agree with the view of Gillanders, J.A., in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, where he said at p. 293 D.L.R., p. 13 O.R.:

> I incline to the view that the essential difference between the limitation sections considered in the *Watkins* and *Dufferin Paving* cases, and the section with which we are here concerned, is that the limitation sections in the cases mentioned were of general application affecting all actions "for the recovery of damages occasioned by a motor vehicle", while the subsection now under consideration only affects the liability of the owner or driver to a *certain type of action*. (The italics are my own.)

In my view, the history of the enactment of what is now s. 105 of the *Highway Traffic Act* and which was at the time of the accident in question in this action, s. 50(2) is significant. There was not, of course, at common law, any liability under the owner of a motor vehicle for damages caused by the negligent driving of that vehicle when the driving was not that of the owner or of his servant. That liability was imposed in the Province of Ontario in the year 1930, by the Statutes of Ontario, 1930, c. 48, s. 10, which added s. 41*a* substantially in the same terms as s. 50(1) of the statute as it existed in the 1950 Revised Statutes of Ontario. In 1935 by the Statutes of that year, c. 26, s. 11, a second subsection was added to the then s. 41 which is in substantially the same terms as s. 50(2) of the Revised Statutes of Ontario, 1950. During the intervening five years, *Falsetto v. Brown et al.*, [1933] 3 D.L.R. 545, [1933] O.R. 645, came before the Courts. There, an accident had occurred on August 17, 1932, in a collision between a vehicle owned by one Brown and being driven by McMaster with the consent of the owner. In the vehicle were two passengers, Miss Falsetto and Harnden, both gratuitous passengers. Miss Falsetto, by her next friend, commenced an action against Brown and McMaster, the owner and driver of the automobile in which she had been a gratuitous passenger and against the owner of the truck with which that vehicle had come in collision, and at trial she was awarded judgment against all defendants. The owner of the truck alone appealed, and the majority judgment in the Court of Appeal held that the negligence of the driver of the automobile had been the sole cause of the collision so the appeal of the owner of the truck was allowed. The liability of the owner of the automobile to the gratuitous passenger founded upon s. 41*a* of the 1930 Statutes of Ontario, c. 48, and which had not been the subject of appeal was the situation which the amendments of 1945 was intended to cure. Gillanders, J.A., in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, was of the opinion that it was the only situation which the amendment was intended to cure. I have come to the conclusion that he was correct when he said, at p. 294 D.L.R., p. 13 O.R.:

> If the appellant has a cause of action against her master by reason for the negligence of his servant, s-s. (2) does not take it away even though at the time it arose she was being carried in her employer's motor vehicle.

The question arises then, did Kearney in this case have a right of action against his employer by reason of the negligence of the employer's servant Livesey? It is my intention to consider the matter, firstly, apart from the doctrine of common employment and the provisions of the *Workmen's Compensation Act*. *Clerk and Lindsell on Torts*, 12th ed., p. 783. said:

> At common law a master owes a duty to his servant to take reasonable care for his servant's safety . . . This duty was described by Lord Herschell as "the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and . . . so to carry on his operations as not to subject those employed by him to unnecessary risk." The classic statement of the duty is to be found in the speeches of Lord Wright and Lord Maugham in *Wilsons & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57 at pp. 78 and 86.

At p. 86, Lord Maugham said:

> The first proposition is that, subject as next mentioned, the employer is responsible to an employee for an accident caused by the negligence of any other employee acting within the scope of his authority. The maxim respondeat superior applies: *Smith v. Baker*, [1891] A.C. 325.

Schroeder, J.A., in giving judgment in the Court of Appeal in *Jurasits v. Nemes*, 8 D.L.R. (2d) 659 at p. 675, [1957] O.W.N. 166 at p. 174, said:

> At common law a master did not warrant the safety of the servant's employment. He bound himself to do no more than to take reasonable care to protect the servant against accidents.

Lord Abinger, C.B., in *Priestley v. Fowler* (1838), 3 M. & W. 1 at p. 6, 150 E.R. 1030, said:

> He [the employer] is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of the judgment, information, and belief.

I am, therefore, of the opinion that there is a duty by implied term of contract to the servant Harrison in the case of *Harrison v. Toronto Motor Car Ltd. and Krug* and to the plaintiff-respondent in this case, to take reasonable care to provide for the safety of that servant when he is engaged in the course of his employment and that there was by the negligence of the defendant Livesey in this case, a breach of that duty and a breach for which the appellant insurance company as the employer of Livesey is responsible in law.

The question then arises whether the appellant is protected by the doctrine of common employment. That doctrine was first enunciated by Lord Abinger, C.B., in *Priestley v. Fowler, supra*.

The defence was carefully defined and limited in *Radcliffe v. Ribble Motor Services Ltd.*, [1939] A.C. 215, where Lord Wright said at p. 247:

> But the limitations which I have explained and which for purposes of this opinion I wish to emphasize are based on the fundamental principle that there must be an actual contract between the employer and employee so that it may be possible from the nature and circumstances of that contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow employees.

And at p. 249:

> But it is clear on the authorities in this House that there is always the limit, however expressed, that it must be the same work in which the workmen are employed. They must be employed in common work, that is, work which necessarily and naturally or in the usual course involves juxtaposition, local or casual, of the fellow employees and exposure to the risk of the negligence of one affecting the other.

Gillanders, J.A., in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, cited this and other authorities and was able to come to the conclusion that the plaintiff Harrison and the chauffeur McKenzie were not engaged in "common work" involving "juxtaposition, local or casual", and exposure of the risk of negligence of one affecting the other and that therefore the defence of common employment did not apply.

The learned Justice in appeal proceeded, however, at p. 296 D.L.R., p. 16 O.R. to say:

> If I am right in concluding that common employment is not applicable under the circumstances, it is not necessary to consider whether or not the appellant comes under Part II of the *Workmen's Compensation Act*, R.S.O. 1937, c. 204, in which case in any event, by virtue of s. 122 of that Act, common employment would have no application. It is, however, probably desirable to express my view on this point.

And then having considered the matter, at p. 297 D.L.R., p. 17 O.R., said: "Under the circumstances here, the appellant, I think, falls within the provisions of Part II of the Act."

In the present case, this Court is faced with the problem of whether the defence of common employment has been barred by the provisions of the said *Workmen's Compensation Act*. Haines, J., said in his reasons for judgment (at trial) (p. 294 D.L.R., p. 5 O.R.):

> As for the defence of common employment I find that it is not available to the defendants by reason of the provisions of Part II of the *Workmen's Compensation Act*, R.S.O. 1960, c. 437, s. 125.

In the Court of Appeal, Aylesworth, J.A., said (p. 197 D.L.R., p. 102 O.R.):

> Here, but not in those decisions, the plaintiff was not a free agent as to his movements after completion of the work of adjustment upon which he and Livesey were engaged; he had been transported to the place where the work of adjustment occurred in the car of the defendant Livesey and for the very purpose of engaging in that endeavour; he was entitled as part of their joint work as employees of the other defendant, to be returned in the same vehicle to the place whence he came; his employment in that endeavour continued, in our view, until that had been done.

I am of the opinion that in this particular case the two employees, the plaintiff Kearney and the defendant Livesey, were jointly engaged in the very same work. Of necessity they were in such juxtaposition as might involve one in the consequence of the negligence of the other. In short, the situation was the exact one in which the defence of common employment as outlined by Lord Wright in *Radcliffe v. Ribble Motor Services Ltd., supra*, would apply. That defence, of course, is no longer available in the United Kingdom because of the provisions of the various employers' liability Acts. The defence is, however, available in Ontario unless it is barred by the provisions of the *Workmen's Compensation Act*. That statute now appears as R.S.O. 1960, c. 437, and the sections are word for word those in effect at the date of the accident. First, it should be noted that s. 1 provides:

> (*j*) "industry" includes establishment, undertaking, trade and business;

and

> (*u*) "workman" includes a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes a learner and a member of a municipal volunteer fire brigade, but when used in Part I does not include an outworker or an executive officer of a corporation.

And ss. 123 to 125 provide:

> 123. Subject to section 126, sections 124 and 125 apply only to the industries to which Part I does not apply and to the workmen employed in such industries, but outworkers and persons whose employment is of a casual nature and who are employed otherwise than for the purposes of the employer's trade or business, who are employed in industries under Part I but who are excluded from the benefit of Part I, are not by this section excluded from the benefit of sections 124 and 125.
>
> 124(1) Where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of his employer or by reason of the negligence of his employer or of any person in the service of his employer acting within the scope of his employment, the workman or, if the injury results in death, the legal personal representatives of the workman and any person entitled in case of death have an action against the employer, and, if the action is brought by the workman, he is entitled to recover from the employer the damages sustained by the workman by or in consequence of the injury, and, if the action is brought by the legal personal representatives of the workman or by or on behalf of persons entitled to damages under *The Fatal Accidents Act*, they are entitled to recover such damages as they are entitled to under that Act.
>
> (2) Where the execution of any work is being carried into effect under any contract, and the person for whom the work is done owns or supplies any ways, works, machinery, plant, buildings or premises, and by reason of any defect in the condition or arrangement of them personal injury is caused to a workman employed by the contractor or by any subcontractor, and the defect arose from the negligence of the person for whom the work or any part of it is done or of some person in his service and acting within the scope of his employment, the person for whom the work or that part of the work is done is liable to the action as if the workman had been employed by him, and for that purpose shall be deemed to be the employer of the workman within the meaning of this Act, but any such contractor or subcontractor is liable to the action as if this subsection had not been enacted but not so that double damages are recoverable for the same injury.

(3) Nothing in subsection 2 affects any right or liability of the person for whom the work is done and the contractor or subcontractor as between themselves.

(4) A workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect or negligence that caused his injury, be deemed to have voluntarily incurred the risk of the injury.

125(1) A workman shall be deemed not to have undertaken the risks due to the negligence of his fellow workmen and contributory negligence on the part of a workman is not a bar to recovery by him or by any person entitled to damages under *The Fatal Accidents Act* in an action for the recovery of damages for an injury sustained by or causing the death of the workman while in the service of his employer for which the employer would otherwise have been liable.

(2) Contributory negligence on the part of the workman shall nevertheless be taken into account in assessing the damages in any such action.

It will be seen that the determination of whether the respondent is entitled to plead the provisions of s. 125 as barring the defence of common employment depends on whether the respondent is a "workman". Section 125 applies only to an *industry* to which Part I does not apply. Then, was the business of the appellant Co-operators Insurance Association an "industry"? In *Lewis v. Nisbet & Auld Ltd.*, [1934] 3 D.L.R. 241 at p. 250, [1934] S.C.R. 333 at p. 345, Crocket, J., giving judgment for a majority of this Court and in dealing with some of the words in the present s. 124(1) "by reason of any defect in the condition or arrangement of the ways, works, machinery, plant buildings or premises. . .", said:

> It will be seen at once that the enactment is a special one which was clearly passed to extend the liability of the employer in favour of the workman. It is an enactment, therefore, which ought not to be narrowly construed against the workman. No Court has any right to add to it any condition which its language does not clearly express or necessarily imply. Rather is it the duty of a Court, as said by Brett, M. R., in *Gibbs v. Great Western R. Co.* (1884), 12 Q.B.D. 208, at p. 211, in construing a section of the Imperial Employers' Liability Act, 1880, to construe it as largely as reason enables one to construe it in their (the workmen's) favour and for the furtherance of the object of the Act.

I accept that as a proper canon of interpretation in order to construe the meaning of the words "workman" and "industry", and I am of the opinion that that course has been followed by the Courts of Ontario in construing this statute. In *Jarvis v. Oshawa Hospital*, [1931] 4 D.L.R. 914, [1931] O.R. 482, Raney, J., held that a hospital was an "industry" within the words "establishment, undertaking, trade, and business" and that a pupil dietitian employed at the hospital at a salary of $8 a week was a "workman".

In *Humphreys v. London*, [1935] 3 D.L.R. 39, [1935] O.R. 295, Middleton, J.A., in the Court of Appeal considering the question of whether a relief recipient required by the municipality as a term of obtaining relief to perform duties as directed by the municipal officers was a "workman" said at p. 43 D.L.R., p. 301 O.R.:

> The Workmen's Compensation Act is intended to apply to *all workmen* and *all employees* save in a case of farming and domestic and menial servants. These are excepted from the operation of the Act by s. 122. Section 118 provides that ss. 119 to 121, that is practically Part II, shall apply only to the industries to which Part I does not apply and to workmen employed in such industries. (The italics are my own.)

In *Wiznoski v. Peteroff*, [1938] 2 D.L.R. 205, [1938] O.R. 113, the Court of Appeal of Ontario held that a bakery employing less than five persons and therefore, excluded from Part I of the Act by the order of the Board was none the less an "industry" to which Part II applied. At p. 206 D.L.R., p. 114 O.R., Middleton, J.A., said:

> I think this argument is fallacious, because by s. 1(*i*) of the Act "industry" is defined to include not only the enumerated classes of industries, but establishments, undertaking, trade and business; that is to say, it includes not only the generic but the specific.

I am of the opinion that the enterprise operated by Co-operators Insurance Association is certainly an "undertaking, trade or business" and that therefore it is an "industry" as defined in the *Workmen's Compensation Act*. Similarly, I can see no reason why the respondent who I have held had at the time of the accident entered into or worked under a contract of service which was oral or implied is not a "workman" as defined by s. 1(*a*) of the said Act. It should be noted that the service may be by way of manual labour or otherwise and that by s. 123 "outworkers and persons whose employment is of a casual nature" are not by that section excluded from the benefits of ss. 124 and 125 so that if the respondent were considered to be a person whose employment was of a casual nature in that he was only from time to time required to act as a servant in servicing the policyholder, he is none the less not excluded from the benefits of ss. 124 and 125.

I have therefore come to the conclusion that the respondent is a "workman" in an industry to which Part II of the *Workmen's Compensation Act* applies and that therefore by the provisions of s. 125(1) of that statute the defence of common employment is barred to the appellant.

The respondent also asserts a right of action by relying upon the provisions of s. 124 of the *Workmen's Compensation Act*. That matter is not referred to in the reasons for judgment either at trial or upon appeal but the respondent has asserted such right in his factum while the appellant, in its factum, confines its reference to the statute to an allegation that it has no application to the relationship between an insurance agent and an insurance company.

For the reasons which I have set out above, I have found that the relationship between the respondent and the appellant at a limited time and for the limited purpose of the adjustment was not solely that of insurance agent and insurance company but was that of master and servant. I find that the respondent was at that time a workman in an industry and I am of the opinion that s. 124 of the *Workmen's Compensation Act* gives to the appellant a statutory right of action for damages which occurred "by reason of the negligence of. . . any person in the service of his employer [i.e., Livesey] acting within the scope of his employment". There is, of course, no doubt that Livesey at the time was certainly acting within the scope of his employment. He was engaged actively in the duty of adjusting a claim which was one of his main duties. I am therefore of the opinion that the plaintiff is entitled to succeed either on the basis of the common law liability of his employer or on the basis of the statutory liability created by s. 124 of the *Workmen's Compensation Act*. Therefore, I do not find it necessary to deal with the alternative submission of counsel for the respondent that the appellant is liable for the negligence of its servant Livesey on the doctrine of *respondeat superior* whether or not the respondent was also the servant of the appellant. That theory entails a startling explanation of the principle enuciated in *Harrison v. Toronto Motor Car Ltd. and Krug, supra*, and one which in my opinion this Court should not make at the present time.

There remains to be dealt with the submission of the appellant that when the action against the defendant Livesey is barred by statute, *i.e.*, s. 50(2) of the *Highway Traffic Act*, then there can be no liability of his employers. This submission was dealt with by Aylesworth, J.A., in giving the reasons of the Court of Appeal in the following words (pp. 197-8 D.L.R., pp. 102-3 O.R.) :

> The appellants took one other point upon which some observations might properly be made. In appellants' submission the master is excused if the servant who did the wrongful act to the plaintiff is excused. We cannot accede to that submission with respect to the case at bar for the simple reason that in our view the effect of s. 105(2) of the *Highway Traffic Act*, R.S.O. 1960, c. 172, is not to condone a wrongful act by the driver of a motor vehicle *qua* driver but simply to bar the cause of action with respect to that act. The Legislature, in our view, is quite free to do what it has done in a case such as this namely, to bar a certain cause of action against a wrongdoer without in any way affecting the legal result of the wrongful act with respect to someone else liable for that wrongful act upon some principle of the common law.

With that view, I am in agreement and I am of the opinion that it is in accord with established jurisprudence. In *Smith v. Moss et al.*, [1940] 1 K.B. 424, Charles, J., considered the case of a wife who sued her mother-in-law as the owner of an automobile in which she was riding as a passenger when she was injured by the negligence of the driver who was her husband. Charles, J., held that at the time of the accident the husband was driving the car in the capacity of agent for his mother. At pp. 425-6, the learned trial Judge said:

> It is said that the plaintiff cannot recover against her mother-in-law because the accident was caused by the negligence of her husband, and a husband cannot commit a tort on his wife. Strictly, that is right, but I cannot conceive that, if a husband, while acting as agent for somebody else, commits a tort, which results in injury to the wife, the wife is deprived of her right to recover against the principal who is employing the husband as agent. To take an extreme case, suppose that the plaintiff had been in the habit of hiring a car from a garage the proprietors of which employed, among a number of other men, the plaintiff's husband as a chauffeur. Suppose, too, that on a particular day, when the plaintiff had telephoned for a car, the husband should be sent out as driver of that car. If an accident happened, for which the husband was responsible, could it then be said that the plaintiff was deprived of her right to recover against the owners of the car? I do not think so, because the active operator in the tort, the husband, would have two capacities (1) that of husband and (2) that of agent. In the present case the husband was, at the time of the accident, acting in the capacity of agent for his mother and it was his negligence alone, I hold, which caused the accident. Therefore, the plaintiff is entitled to succeed against her mother-in-law, the second defendant.

It is, of course, realized that Charles, J., was not considering a case in which any such statutory provision as s. 50(2) of the *Highway Traffic Act* barred action against the actual wrongdoer. *Smith v. Moss* is cited merely to illustrate the proposition that an action may lie against the master even when it is barred against the servant.

The judgment in *Smith v. Moss*, was considered in *Broom v. Morgan*, [1953] 1 Q.B. 597, in the Court of Appeal. There, husband and wife were both employed by the defendant in a public house, the husband as manager, the wife as helper. Owing to the negligence of the husband in the course of his employment as manager, the wife was injured. Denning, L.J., said at pp. 607-8:

> It is said by Mr. Thompson that the liability of the employer is only a vicarious liability — that is to say, that it is a substituted liability whereby a person who is not morally answerable is made responsible for the liability of another, and it cannot exist if that other is not liable.
>
> I am aware that the employer's liability for the acts of his servants has often been said to be a vicarious liability, but I do not so regard it. The law has known cases of a true vicarious liability; for instance, in the old days when a wife uttered slanders at a tea party with her friends, the husband was answerable for her wrongdoing, although it was no concern of his. I do not regard the liability of master and servant as coming into this category. The master is not liable when a servant does something "on a frolic of his own." He is liable only when the servant is

> acting in the course of his employment. The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done. Take the case of a master who sends a lorry out on to the road with his servant in charge. He is morally responsible for seeing that the lorry does not run down people on the pavement. The master cannot wash his hands of it by saying, "I put a competent driver in charge of the lorry," or by saying, "It was only the driver's wife who was hurt." It is his lorry, and it is his business that it is on. He takes the benefit of the work when it is carefully done, and he must take the liability of it when it is negligently done. He is himself under a duty to see that care is exercised in the driving of the lorry on his business. If the driver is negligent there is a breach of duty not only by the driver himself, but also by the master.

Denning, L.J., repeated his view in *Staveley Iron & Chemical Co. v. Jones*, [1956] A.C. 627. In that case Sellers, J., at trial considering an action by a workman against his employer for damages caused by an accident occurring in the course of employment had applied *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152, to find that the plaintiff had not been guilty of contributory negligence and then applied the same standard to find that the defendant company's servant also was not guilty of negligence, and in consequence dismissed the action. In the Court of Appeal [[1955] 1 Q.B. 474] (Denning, Hodson, and Romer, L.JJ.) it was decided that the crane operator, the defendant company's servant, had been negligent in her conduct and that therefore the employer was liable for the damage caused to her fellow employee, the plaintiff Jones.

Denning, L.J., said, in the course of his judgment (p. 480):

> He [*i.e.*, the employer] acts by his servant; and his servant's acts are, for this purpose, to be considered as his acts. Qui facit per alium facit per se. He cannot escape by the plea that his servant was thoughtless or careless or made an error of judgment. If he takes the benefit of a machine like this, he must accept the burden of seeing that it is properly handled. It is for this reason that the employer's responsibility for the injury may be ranked greater than that of the servant who actually made the mistake: see *Jones v. Manchester Corporation*, [1952] 2 Q.B. 852, and he remains responsible even though the servant may for some reason be immune: see *Broom v. Morgan* [1953] 1 Q.B. 597.

In the House of Lords, Lord Morton of Henryton, expressed disagreement with that statement and continued at p. 639:

> My Lords, what the court has to decide in the present case is: Was the crane driver negligent? If the answer is "Yes," the employer is liable vicariously for the negligence of his servant. If the answer is "No," the employer is surely under no liability at all.

And Lord Reid said at p. 641:

> In *Broom v. Morgan* [1953] 1 Q.B. 597, a husband and wife were fellow servants and the wife was injured by the negligence of the husband. She recovered damages from her employer although she could not sue her husband. But, although the husband could not be sued, his injuring his wife was a wrongful act on his part and against the law: it is to my mind no authority for a master being liable for an act *which it was not wrongful for a servant to do.* (The italics are my own.)

I am of the view that the last statement of Lord Reid supplies the answer to the appellant's argument that when the action against the defendant Livesey is barred by statute there can be no liability on Livesey's employer. The employer is being held liable for an act of Livesey's which was wrongful and the employer is being held because Livesey did that act in the course of his (Livesey's) employment. The actual words of the statutory bar of action against Livesey are significant:

> 105(2) Notwithstanding subsection 1, the owner or driver of a motor vehicle, [illegible] engaged in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from [illegible] (The italics are my own.)

There is in these words no declaration that the act is in any way a right that is divorced from a wrongful act and, of course, a right to do [illegible] a tort. All the statute does is to bar [illegible] owner or driver for part of the damage which may flow from the tort. It would be interesting to speculate what would occur if a gratuitous passenger had on his knees a precious object of art which was destroyed in a collision due to the driver's negligence although the passenger [illegible] The action upon the tort is not barred against the employer.

After the decision of the House of Lords in *Staveley Iron & Chemical Co. v. Jones*, *supra*, McNair, J., in *Harvey v. R. G. O'Dell Ltd. et al.*, [1957] 1 All E.R. 657, considered an action by one servant against his master based on the negligence of a fellow servant and gave judgment for the plaintiff despite the circumstance that the period of limitations had run out against the personal representative of the deceased servant so she could not be sued nor made the subject of a claim for indemnification by the employer. Therefore, McNair, J., came to the same conclusion as to the existence of the master's liability despite the servant's representative's protection from liability as did the learned trial Judge and the Court of Appeal in the present case did, in my opinion, correctly.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed.

HUBA v. SCHULZE, (1962) 32 D.L.R. (2d) 171 (Man. C.A.)

MILLER, C.J.M.:—The facts are fully stated in the reasons for judgment of my brothers Freedman and Guy which I have had the opportunity of reading.

I am of opinion that under the principles decided by *Donoghue v. Stevenson*, [1932] A.C. 562, there was a duty upon the defendant Schulze and that Schulze, who was in the place of owner of the truck being used for the moving, did not take reasonable care to avoid injuring the plaintiff.

As to Shaw: I do not think he had any duty toward the plaintiff and, in any event, that he was not guilty of any act or omission which would make him liable in damages to the plaintiff. Shaw was a voluntary helper of the defendant Schulze. It is true that Schulze asked Shaw to secure the heavy tail-gate in the precarious and dangerous position in which it had been placed. This, however, was a request which was physically impossible for Shaw to carry out; there were no means of securing the tail-gate in that particular position, as has been well stated by my brothers and so found by the learned trial Judge. Shaw could not be held responsible for failure to do the impossible. I do not think anyone expected the defendant Shaw to stand there and hold the tail-gate in position, as his task was to pile onto the truck the goods or furniture brought by the plaintiff. Neither do I feel that he had any duty to warn the plaintiff every time the latter came near the tail-gate. The plaintiff had just as much responsibility to ask as Shaw had to warn. Shaw had no knowledge that Schulze had told the plaintiff everything was in order, as mentioned *infra*.

As to contributory negligence: I cannot see that the plaintiff was in any respect guilty of contributory negligence. He had heard Schulze ask Shaw to secure the tail-gate and had been told by Schulze, according to evidence which the learned trial Judge accepted, that everything was in order and to proceed with the loading. Under those circumstances I can see no ground for finding contributory negligence against the plaintiff. I do not agree with the trial Judge's finding of such contributory negligence and would award judgment against Schulze for the full amount assessed by the learned trial Judge.

I am not satisfied that there was any master-servant relationship between the plaintiff and the defendant Schulze.

In the result, therefore, I would hold Schulze solely responsible for the full damages sustained by plaintiff as found by the learned trial Judge.

I would give judgment for the plaintiff against Schulze, with costs here and below, and dismiss the action against Shaw, with costs here and below.

I would vary the judgment accordingly.

SCHULTZ and TRITSCHLER, JJ.A., concur with FREEDMAN, J.A.

FREEDMAN, J.A.:—This is an appeal by the defendants from a judgment of Campbell, J., who held that the plaintiff was entitled to damages for his personal injuries on a basis of 75% degree of liability on the part of the defendants and 25% on the part of the plaintiff himself.

Central to the whole case is the determination of the relationship that existed between the parties and of the rights and obligations which in law would flow therefrom. For this purpose it is necessary to examine the facts in some detail. Here I may say that the learned trial Judge found the plaintiff to be a reliable and credible witness, preferring his testimony, in cases of conflict, to that of either of the two defendants. My recital of the facts takes this into account.

On April 29, 1960, the plaintiff came to the premises of Winnipeg Motor Products Ltd. in quest of work. The evidence indicates that at an earlier period he had for a time been employed there. He interviewed the defendant Schulze, a salesman in the employ of the company. Schulze told him that there was no job then available for the plaintiff, but indicated that a job was open at Notre Dame Car Wash and suggested that the plaintiff go there the following day. He also stated that he would telephone Notre Dame Car Wash in the plaintiff's behalf. Thereupon he asked the plaintiff if he would do him a favour. He explained that he was moving from one residence to another and requested the plaintiff to assist him with the job of moving. The plaintiff at once agreed.

The defendant Shaw was also an employee of Winnipeg Motor Products Ltd., being apparently junior in status to his co-defendant. To him Schulze then made a similar request for assistance in moving, and Shaw also agreed to help.

Thereupon Schulze instructed Shaw to take a large dump truck which belonged to the company, fill it with gas, and drive it to his, Schulze's residence at 29 Scotia St. He also requested the plaintiff to clean the windows of the truck before it left the company's premises, and this the plaintiff proceeded to do. Shaw then, after filling the truck with gas, drove it to 29 Scotia St. Meanwhile Schulze drove plaintiff there in his own car.

We now have the three parties at 29 Scotia St. First of all, Schulze invited the plaintiff in for some food. Following the plaintiff's meal, the three men turned their attention to the task of moving. The evidence makes it plain that the entire undertaking was under the direction and control of Schulze. It was his job, and he took the lead in indicating how it should be carried out. He instructed Shaw to place the dump truck in the driveway with its front facing Scotia St. and its rear towards the garage. Then at his request, Shaw and the plaintiff cleaned the interior of the truck, removing bits of ice therefrom. The articles to be moved from 29 Scotia St. were contained in cartons in the garage. The pattern of operations, which was dictated and set by Schulze, was as follows: Schulze was to be in the garage handing cartons to

the plaintiff, the plaintiff would then carry the cartons to the truck and place them thereon, and Shaw, who was standing on the truck, would then arrange these cartons in suitable positions for efficient loading. That was the plan; but to understand the tragic accident that befell the plaintiff in the course of its execution some description must be given of the truck and of the use to which, under Schulze's direction, it was put.

This was a large dump truck. Concerning its mode of operation the learned trial Judge had this to say:

> It is designed to carry a number of tons of material, and its method of use is to release the lever off the tail-gate when it is in the closed position and then elevate the front of the box and the material would then slide out the rear. The tail-gate is hinged at the top and not at the bottom, thereby enabling it to open at the bottom and allow the contents of the box to be dumped onto the ground. The tail-gate is 7 ft. wide, 3 ft. high and 2½ ins. thick, and its weight is estimated to be 300 to 500 lbs. The floor of the truck is 4 ft. 6 ins. from the ground.

It takes little imagination to perceive that with the tail-gate in its normal position the truck was not well suited for loading. Each carton would have to be raised over the top of the tail-gate, a height of 7 ft. 6 in. But if the tail-gate could be placed in such a way that it would not be a barrier to loading, cartons would only need to be raised to a convenient height of 4 ft. 6 in. Schulze accordingly told the men to lift the tail-gate. The object was to swing it upon its hinges, a distance of 180 degrees, or a little more, so that the hinges would then be at the bottom and not at the top of the tail-gate. It must be said at once that this was an unnatural and improper use of the tail-gate, for this would leave it standing in so precarious a position that unless effective steps were taken to secure it in that position it would be a potential hazard of a very dangerous and even lethal character.

Nonetheless, the three men proceeded to the task of lifting the tail-gate. Because of its great weight, iron bars had to be used, Schulze taking one bar and the other two men each taking another. In this manner the tail-gate was raised. The next step was the crucial one. It was to arrange that the tail-gate be secured in that position in some way so that the work of loading could proceed in safety. Schulze thereupon told Shaw to get on the truck and secure the tail-gate. Shaw at once climbed upon the truck for this purpose. It is common ground that he then busied himself with certain chains which were attached to the tail-gate. His object was to place these chains in an appropriate place — he was looking, he said, for "notches" — so as to hold the gate firmly in place. The fact is that there did not appear to be any such notches. Indeed it seems clear that the truck was not equipped with any mechanical device to hold the tail-gate in the position in which Schulze had directed it be placed. To give the necessary security, Shaw would probably have had to hold the tail-gate in place manually. But he did not do so.

At this point it is well to quote an extract from the evidence of the plaintiff:

Page 95: "Q. You and Mr. Schulze were behind the truck? A. Yes. Q. And Mr. Shaw was on the truck? A. Yes. Q. What was the next thing that happened? A. Mr. Schulze said everything is all right, everything is okay, everything is done, you can go ahead."

It was only after this assurance of Schulze was given that the actual job of loading commenced. The plaintiff brought one carton, perhaps two, from the garage to the truck. It was when he was in the act of placing the next carton in the truck that the tail-gate fell, striking the plaintiff and inflicting upon

him very grave and extensive facial injuries, of which the most serious was the loss of an eye.

Here then was what occurred on the day in question. Can it be said that in those circumstances the defendants owed no duty of care to the plaintiff? The learned trial Judge found such a duty to exist. It had its source, as he viewed the matter, both in the presence of a master-servant relationship and in that of invitor-invitee. I think there is a very strong case for resting the liability of Schulze upon the law of master and servant or upon principles akin thereto. Perhaps, too, he can be held liable as an invitor, but as the duty imposed upon him as master was higher than the duty upon him as invitor, it is unnecessary to pursue that secondary basis of liability any farther. Shaw's liability, however, cannot be either as master or as invitor, for he was neither. That is not to say that he is not liable. In my view he is — the basis of his liability being the direct breach of a duty of care towards one who clearly was his "neighbour" within the meaning of *Donoghue v. Stevenson*, [1932] A.C. 562. Indeed that principle is broad enough to impose liability upon Schulze as well. "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour", said Lord Atkin [p. 580]. In my opinion both Schulze and Shaw failed to take such reasonable care towards the plaintiff.

One must guard against the danger of thinking that because the plaintiff had agreed to do Schulze a favour, and because Schulze was not in a formal sense the employer either of the plaintiff or of Shaw, the enterprise in which they were engaged should be regarded as a merely friendly and social one, not susceptible of creating rights and obligations between the parties. But the law is neither so narrow nor so unrealistic. One who, like the plaintiff, agrees to assist another without payment is not thereby denuded of legal rights and left without protection. One who, like Schulze, accepts such gratuitous service is not thereby liberated from the obligation to act with reasonable care. The law looks to the conduct of the parties in the relationship in which they stand. If in such relationship a reasonable and prudent man would be expected to exercise care and attention towards persons who foreseeably might suffer injury through his lack of such care and attention, the law will insist upon compliance with that duty of care and will impose liability for its breach. Friendly though the arrangement between the parties may here have been, and without any monetary consideration though it was, it still gave rise to a relationship in which the duty of care existed. In my view Schulze (and Shaw too) owed such a duty to the plaintiff and negligently failed to observe it.

Towards the others assisting him in the undertaking, Schulze acted in the role of master. The usual test by which a master is identified is the exercise of control or, at all events, the right to exercise it. In the normal relationship of master and servant the latter will accept such control because he recognizes it as one of the prerogatives of an employer enforceable, if need be, by the ultimate sanction of dismissal. That the power of dismissal was here absent in the ordinary sense does not alter the fact that the plaintiff (and for that matter Shaw as well) accepted the control and direction of Schulze. It was Schulze whose project it was and he organized and laid out the job. In the entire record there is not a single line suggesting that at any stage of the project either the plaintiff or Shaw gave any direction to Schulze. On the other

hand the record abounds, especially in the testimony of the plaintiff, with instances of Schulze giving directions and instructions to the others. He was the *de facto* master, and towards him the plaintiff stood in the role of servant. That a person can be a servant for a single occasion, even though acting gratuitously, is recognized by the law (*Vide, Holdman v. Hamlyn*, [1943] 2 All E.R. 137; *Salmond's Law of Torts*, 12th ed., p. 109 and cases there cited). Perhaps the motivation for the plaintiff's willingness to assist and serve Schulze was simply human generosity. Perhaps Schulze's intimation that he would help the plaintiff secure a job may also have played a part. We cannot always pin-point the impulses underlying human conduct. It is enough to know that the plaintiff agreed to serve Schulze and that he was in the act of so doing when injured.

On this branch of the case Schulze's liability is that of a master, or at all events (making every allowance for the special nature of the relationship between the parties) of a *quasi*-master. One of the duties of a master towards his servant is to provide a safe system of work. (*Vide, English v. Wilsons & Clyde Coal Co.*, [1936] S.C. 883; *Speed v. Thomas Swift & Co.*, [1943] 1 All E.R. 539; Salmond, *op. cit.*, p. 132). Bearing in mind the *de facto* role of Schulze as master, I hold that such a duty lay upon him. In the discharge of that duty he failed. He was the one who directed that the tail-gate should be raised upwards to a position in which, unless it were effectively secured, it would be a source of danger. He was the one who, without taking care to see that the tail-gate was secured, assured the plaintiff that he could proceed with the task of loading. Having invited the plaintiff to assist him with the job of moving, he was in all the circumstances of the case under a duty to take reasonable care for the plaintiff's safety. I hold that in disregard of the plaintiff's safety he negligently exposed him to the hazards of an unsafe system of work, in consequence of which the plaintiff sustained his injuries.

What of Shaw? Surely his role as a tortfeasor stands out with unmistakable clarity. He knew that it had taken the strength of three men, and the mechanical assistance of three iron bars, to raise the tail-gate. If it fell, it could in its descent be a weapon of terrifying power. He had been expressly told by Schulze to secure the tail-gate. Beyond some futile efforts to find an appropriate place in which the chains might be hooked or attached, he did nothing. Meanwhile the plaintiff was already bringing cartons to the truck, and Shaw was accepting them from him. If ever a person was entitled to the protection of "the neighbour principle", that person was the plaintiff. He was Shaw's neighbour in the literal sense, and Shaw ought to have foreseen that each time the plaintiff came with a carton to the truck he was bringing himself within an area of danger. In such circumstances, Shaw's minimum duty to the plaintiff was either to hold the gate manually or to warn the plaintiff that it had not yet been secured. He did neither. He must be held accountable to the plaintiff for his tortious omissions.

As I view the matter, Schulze's liability can also be founded on the neighbour principle, apart altogether from considerations of master and servant. That at the moment when the tail-gate fell Schulze was in the garage, physically several feet farther away from the plaintiff than was Shaw, is in no sense decisive. In *Donoghue v. Stevenson*, the consumer of the ginger beer was not even known to the manufacturer. It was enough that the manufacturer ought to have had her in contemplation. In the present case, the relationship between the plaintiff and Schulze was direct and obvious. Schulze was

fixed with the same knowledge as Shaw as to the potential dangers that lay in the tail-gate, raised and unsecured as it was. Without taking care to see that the gate had been safely fastened or otherwise immobilized, he expressly gave the word to the plaintiff that it was in order for him to proceed with the loading. He knew or ought to have known that if the tail-gate fell the plaintiff might be injured. He owed a duty to the plaintiff — his neighbour both in fact and in law — and he failed to discharge that duty.

A word must be said on contributory negligence. The learned trial Judge found such negligence on the part of the plaintiff, and apportioned liability upon him to the extent of 25%. Although the learned trial Judge did not specify the particulars of the plaintiff's negligence, there is some basis on which his conclusion can be supported. Despite the fact that the plaintiff had no prior personal experience with a dump truck of this kind, he too ought to have realized that there were dangers inherent in the tail-gate. That he was disarmed by the assurances given by Schulze is probably true. Yet it can well be said that one in the plaintiff's circumstances, taking care for his own safety, ought not to have approached the truck without first checking that the gate was secured or at least specifically enquiring of Shaw whether in fact it was. On that view some negligence could be imputed to the plaintiff. The learned trial Judge quite properly fixed the greater responsibility upon the defendants, and I would not challenge his apportionment.

General damages were assessed at $13,500. Counsel for the defendants contended these were excessive. I do not agree. Apart from the ultimate loss of his left eye the plaintiff sustained painful injuries to the middle portion of his face, at least ten bones being fractured in that area. The vision in his right eye had been much poorer than that in his left. By reason of the accident he has now been left with eyesight that is grossly impaired. Moreover his right eye "tears" continually. Even the cosmetic results of very good medical and surgical care have been far from satisfactory. I would not reduce the award of damages.

The appeal must be dismissed with costs.

GUY, J.A. (dissenting) :—I am of the opinion that this appeal should be allowed.

The plaintiff Huba, according to his own evidence, was 38 years old when this accident occurred. He had been employed, since arriving in Canada on September 22, 1957, in various types of construction work. He named G. M. Gest, Gas Company Contractor; Mid-West Engineering Company; Hurst Engineering & Construction; Peter Leitch Construction; Winnipeg Motor Products; and Malcolm Construction Company (at Thompson, Manitoba).

On April 29, 1960, Huba went to Winnipeg Motor Products Ltd. and enquired from Schulze about getting a job. Huba had known Schulze from the time he had previously worked with him at Winnipeg Motor Products. Schulze indicated that there was no opening at Winnipeg Motor Products but that he might get a job at Notre Dame Car Wash. In the meantime, it appears that Schulze was moving from 29 Scotia St. and, noting that Huba was unemployed, Schulze asked if Huba would do him a favour. Huba agreed. The favour, of course, was helping Schulze to move from 29 Scotia St.

Schulze borrowed a large dump truck from Winnipeg Motor Products and the truck was driven to 29 Scotia St. to be loaded. Another Winnipeg Motor Products employee, the defendant Shaw, also went to 29 Scotia St. to assist Schulze.

After Schulze had provided a small meal for Huba, the three of them — Schulze, Huba and Shaw — gathered around the back of the truck and attempted to lift up the tail-gate. The tail-gate measured 7 ft. in width, 3 ft. in height, and was approximately 2½ ins. in thickness. It was made of reinforced steel and was hinged at the top. Its estimated weight was anywhere from 300 to 500 lbs. In any event, each of the three men equipped himself with a steel bar in order to push the tail-gate up and, between the three of them, they did so.

When raised, the tail-gate could only be pushed up and back on its hinges about 185 to 190 degrees. In other words, when raised, the bottom edge of the tail-gate was not straight up — an angle of 180 degrees from its starting position — but tilted slightly towards the front of the truck. The evidence of Huba and Schulze and Shaw is that the tail-gate remained in the raised position for about 10 minutes without teetering over and falling down. However, when Huba was loading a box onto the truck the tail-gate tipped over and fell on his face, causing him grievous injury.

Huba sued Schulze, Shaw, and Winnipeg Motor Products Ltd. for damages. The action was discontinued as against Winnipeg Motor Products. The statement of claim, in so far as it relates to the two remaining defendants, simply states:

> 9(a) The Defendants, Shaw and Schulze were negligent in that they negligently caused the said tail gate to be left in such a position as could reasonably have been anticipated to cause damage to the Plaintiff.

On appeal, the broad allegation of negligence was dealt with under the principles expressed in *Donoghue v. Stevenson,* [1932] A.C. 562. In addition, however, counsel dealt with the questions of a master-servant relationship and the law relating to invitor and invitee. This was because the learned trial Judge, in his reasons for judgment, said:

> In my opinion there was a dual relationship of (a) invitor and invitee, and (b) master and servant. The plaintiff is entitled to recover under either.

With respect, I can find nothing in the evidence to support the finding of a master and servant relationship as that relationship is discussed in *Mersey Docks & Harbour Bd. v. Coggins & Griffiths (Liverpool) Ltd.,* [1946] 2 All E.R. 345.

There was no engagement for pay (which ordinarily requires proper attention to the job on pain of dismissal), and no real authority to direct and control the manner in which the plaintiff was to act in furtherance of the general operation. In the cross-examination of Shaw by plaintiff's counsel, the following was elicited:

> Q. I will refer to page 12 of the examination for discovery, Questions 89, 90 and so on: Do you remember being asked these questions and making these answers, witness? (reading)
>
> "Question 89: Or did you sort of naturally take those positions? Answer: That is right. It could have been Mr. Schulze up on the truck or me in the garage.
>
> "Question 90: But that is what was supposed to happen, one in the garage, one on the truck, and one loading? Answer: Yes.
>
> "Question 91: It fell into that way when 3 people are doing it? Answer: Yes."

While it is true that Schulze asked Shaw to get up on the truck to secure the tail-gate, in the circumstances this does not appear to be an order from a master to a servant but rather a simple case of Schulze properly taking the lead in organizing the work of loading the truck. He was not exercising real authority in directing and controlling the operation as a matter of right and as a master of his servant.

While a master must provide a safe system of work for his servant, in my opinion no master-servant relationship existed here.

The learned trial Judge said plainly that wherever there was conflict between the evidence of Huba and that of Schulze and Shaw he preferred and believed that of Huba. Accordingly, before quoting the evidence of Shaw, *supra*, I compared it with the evidence of Huba. There does not appear to be any conflict.

While Huba was not asked the same questions, his answers to such questions as were put to him show that Schulze was busy sorting out the boxes which were to go onto the truck (because some were not to go), and "the third man" was waiting on the truck.

Batt on The Law of Master & Servant, 4th ed., states the law clearly at p. 5:

> There are two essentials in the relation of master and servant, namely: (1) the servant must be under the *duty* of rendering personal services to the master or to others on behalf of the master, otherwise the contract is a contract of sale of goods or the like; (2) the master must have the *right* to control the servant's work, either personally or by another servant or agent. (The italics are mine.)

In so far as an implied contract or agreement of service is concerned, I am obliged to find, with respect, that the circumstances in the case at bar come very close to a *nudum pactum*. The only consideration moving from Schulze to Huba was "something to eat", and I do not feel that is sufficient consideration.

Now, with regard to the question of the relationship between invitor and invitee: counsel for the defendants concedes that in the circumstances Schulze was an invitor (although Shaw was not) and Huba was an invitee. But he argued that mere knowledge of the danger (*sciens*) by the invitee is enough to discharge the onus on the invitor.

In *London Graving Dock Co. v. Horton*, [1951] 2 All E.R. 1, Lord Porter says at p. 6:

> The difference between *sciens* and *volens* has by now been firmly established, but where the exact line is to be drawn is a matter of more difficulty. The accurate demarcation, however, in my opinion, need not be laid down in the present case, since it is enough to protect the invitor from liability if he proves that the invitee knew and fully appreciated the risk.

Lord Normand, at p. 10 of the same report, states:

> Judicial *dicta* in support of the view that warning is a discharge of the invitor's duty generally are not lacking and they are of high authority. Thus, in *Cavalier v. Pope*, [1906] A.C. 428 Lord Atkinson said at p. 432 of *Indermaur v. Dames* (1866), L.R. 1 C.P. 274:
>
> ". . . one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows the danger and runs the risk he has no cause of action."
>
> In *Brackley v. Midland Ry. Co.* (1916), 85 L.J.K.B. 1596, Swinfen Eady, L.J., and Bankes, L.J., expressed the same opinion, pp. 1606, 1608. So also did Viscount Maugham in *Griffiths v. Smith* [1941] 1 All E.R. 66 at p. 74.
>
> *When there is already knowledge, notice or warning will have no effect and the omission of it can do no harm.* (The italics are mine.)

Lord Justice Denning in *Christmas v. Gen'l Cleaning Contractors Ltd.*, [1952] 1 All E.R. 39, sums up the *Horton* decision at p. 41 as follows:

> The decision of the House of Lords in *London Graving Dock Co., Ltd. v. Horton* shows that an occupier can allow his premises to remain defective and dangerous with impunity so long as he gives

> (workmen) warning of the risk *or the danger is so obvious that they must be aware of it.* (The italics are mine.)

It appears to me to be well established that *sciens* on the part of the invitee is sufficient, in cases involving invitor and invitee, to relieve the invitor from the liability imposed on him.

In the present case Huba, having helped to put up the tail-gate into its precarious position, obviously had knowledge of the situation. It was argued that since Schulze had asked Shaw to secure the tail-gate, and Shaw had climbed into the truck for that purpose, Huba was entitled to assume that the tail-gate was secure in the absence of any warning from Shaw that he had not in fact been able to fasten the tail-gate in the open position.

In the circumstances I do not think Huba was entitled to rely blindly on Schulze's direction to Shaw to "secure the tail gate" or to rely on Shaw to tell him every time he came back with another load that the tail-gate was still not fastened.

Huba said at one point that he started in with the loading because Schulze told him everything was okay to go ahead. This might have some force of logic if it were not for the fact that, as I have said, Huba was a man 38 years old, looking at this tail-gate and seeing for himself how it was balanced regardless of what anybody told him.

With respect, I am of the opinion that this argument is simply playing mental chess with three legal pawns. It is a case of inventing implied undertakings and duties in an effort to award compensation to a man who admittedly was seriously injured in the accident. But from a broad realistic view it must be allowed that this was, after all, a most commonplace everyday type of undertaking. The maxim *ubi jus, ibi remedium* does not mean that wherever injury is suffered someone else must pay.

The learned trial Judge, in his reasons for judgment, accepts the evidence of Huba in preference to that of Shaw and Schulze. Huba said he had "never worked with trucks like this". In his reasons the trial Judge said: "I accept the statement that none of the three parties knew or had knowledge about this truck." But it was Huba himself who outlined the various construction jobs on which he had worked and, with respect, I must say that it takes no great imagination or high level of intelligence for a man 38 years of age to watch out for his own safety. If he had never worked with this type of truck before, even on various construction jobs, that would be all the more reason for him to be wary of it. He knew from helping to lift the tail-gate that it was very heavy and he could see from looking at it in broad daylight that it was in a risky position.

The onus is on the invitee Huba to prove that the invitor Schulze was negligent and that, as far as Shaw was concerned, Shaw was negligent in failing to warn Huba.

Without indulging in fantasy, this case is not too different from the illustration of a man helping his neighbour to put on storm windows. As an annual enterprise, this often requires someone to clean and carry the windows up from the basement; someone to ease the windows up the ladder to the second storey; and someone inside the house to try to hook the windows in place. In the course of the operation it is not uncommon for the man on the ladder to have the window slip or fall, injuring him and breaking the window. But in such an event (as in this case) it is not only a matter of accident that the window should slip or drop, but it is a matter of accident as to which one of the three would be the one on the ladder and holding the window.

The general argument based on *Donoghue v. Stevenson*, *supra*, presents no difficulty so far as I am concerned.

Again quoting from *London Graving Dock Co. v. Horton*, [1951] 2 All E.R. 1, with respect, I adopt the words of Lord Porter at p. 7 as follows:

> The argument based on *Donoghue* v. *Stevenson* can be more rapidly disposed of. The pursuer in that case had purchased from a middle-man a bottle of ginger beer into which a snail had crept, and was made ill by drinking the contents. She did not, however, sue the vendor, but proceeded against the original manufacturer, alleging that he ought to have contemplated that the ginger beer would in the ordinary course reach the lips of the pursuer without any intermediate examination and that he was negligent in not ensuring that the bottle had been kept clean before the ginger beer was inserted. Your Lordships' House held that, assuming the facts alleged to be true, the manufacturer would have escaped if it was natural to expect that the intermediate vendor would take care to see that the contents were in order. The pursuer, however, could recover from the manufacturer because such an examination was not to be expected. The law required him to be careful not to run the risk of injuring a person whom he contemplated, or ought to have contemplated, as likely to be injured by his negligence, but an examination by the retail vendor, if rightly expected, could be relied on by the manufacturer and would have been a complete answer to the claim. Still more so would knowledge by the purchaser of the true position.

Whole chapters might be written concerning the legal relationships of the one person to the others, and examples might be multiplied as well. But in my opinion, in the light of the evidence we have in this case, the injury was simply caused by a most unfortunate pure accident.

I would allow the appeal and dismiss the plaintiff's action, with costs here and below. In the circumstances it is not necessary for me to deal with the question of the quantum of damages.

Appeal dismissed.

Chapter II: The Scope of Employment

BATTISTONI v. THOMAS. Supreme Court of Canada. [1932] S.C.R. 145.

Appeal from the decision of the Court of Appeal for British Columbia reversing the judgment of the trial judge McDonald J., and dismissing the appellant's action for damages resulting from the alleged negligent driving of an automobile by the respondent Claude Thomas.

LAMONT J. The respondent, Morgan Thomas, lives at Steveston, on Lulu Island, an hour's drive south of Vancouver. He had a contract to deliver milk to the Fraser Valley Milk Producers Association, whose place of business (dairy) was in the city of Vancouver, but farther south than was the down-town section of the city. This milk he gathered up in cans from the neighbouring farmers, took it to the dairy in a motor truck, exchanged the full cans for empty cans and distributed the empty cans either the same day or the following morning, to the farmers. He employed his son Claude Thomas to drive the truck and deliver the milk.

On Christmas day, 1929, Claude drove his truck load of milk to the city and delivered it at the dairy, where he finished unloading about one o'clock. He had orders to be back home at 3 p.m., when the family intended having their Christmas dinner. Instead of returning home from the dairy as soon as he had delivered the milk, as was his custom, Claude went to the basement of the dairy and there changed his working clothes for a better suit (dressed up) and then proceeded to drive north to the down-town section of the city, having in his truck the empty milk cans. He drove to the Cascade Cafe where he had his dinner. After dinner he drove to the Dominion Hotel to see his friend Fred Reggy, who lived there. They remained at the hotel a short time and then spent two or three hours driving around the city, after which the two boys went to the Pantages Theatre. After the theatre they decided to go to visit a friend, Smith by name, on the other side of the Union Oil Company's premises. Smith was not at home, so they turned to come back. As they were driving back Claude Thomas ran down and severely injured the apellant. At the time the accident occurred, Claude was driving west on Union Street headed for the Dominion Hotel, taking Fred Reggy home. After leaving Reggy at the hotel Claude drove to his father's farm.

The sole question in this case is: Was Claude Thomas at the time of the accident, in the course of his employment as his father's truck driver. or was he. as it is put in some of the cases, "on a frolic of his own?"

The contention of the appellant is that when Claude found that his friend Smith was not at home and turned to come back, with the intention of leaving Fred Reggy at the Dominion Hotel and then going on home himself, he was in the course of his employment from the moment he started back from Smith's house, and that his going to the Dominion Hotel was a mere deviation from the direct route home, which does not relieve the respondent of liability.

On the other hand, the respondent's contention is that Claude was on a frolic of his own from the time he dressed up and drove down town until he arrived back at the Dominion Hotel from Smith's, as all his actions during that

time are totally inconsistent with his being engaged on his employer's business.

In cases of this kind the law is well settled. A master is responsible for the consequences of his servant's negligent act only while the servant is on his master's business. That is to say, the master is responsible for the result of the negligent acts of his servant committed in the course of the servant's employment. The difficulty, however, is to determine when the master's employment has ended and the servant's frolic has begun, or, as in this case, to determine when the servant's frolic ended and he again entered upon his master's business. . .

Can it reasonably be said that Claude Thomas, at the time of the accident, was doing something in the discharge of his duty to his employer directly or indirectly imposed upon him by his contract of service, or arising out of it? Or, was his driving west on Union Street so connected with his duty to his employer as to be a mode of performing that duty? The evidence, in our opinion, shews the very opposite to have been the case. When the two boys set out from the Dominion Hotel and drove around the streets for two or three hours, they were clearly on a frolic of their own. So were they also when they went out to visit Smith. And, as in Mitchell v. Crassweller (1853), 22 L.J.C.P. 100, it was on the return journey (in this case from Smith's to the hotel), that the accident happened. In our opinion, this frolic cannot be said to have ended until they returned to the Dominion Hotel from whence they started. When they started out, Claude was on a journey separate and distinct from that which he had been employed to perform by his father. In coming back to the hotel he was not going in the direction of his father's farm at all, but away from it. In order to have the visit to Smith's house brought within the principle of the "detour" cases, Claude must have been on his father's business at the time he started to go to Smith's. This clearly was not the case. For several hours before setting out to make the visit, the boys had been driving around town, or at the theatre, neither of which pastimes was in any way connected with the business of the respondent. The appellant advanced the argument that it was Claude's duty to take the truck home and that he was in the performance of that duty when he started back from Smith's. This argument is founded on two answers made by Claude to questions put to him: he was asked if he was in the course of his employment at the time of the accident, to which he answered "Yes". As that was a mixed question of law and fact and the very question which the court had to decide, the pronouncement of Claude on the question could not be very helpful. The other answer referred to what he was doing on Union Street. The evidence is as follows:

The court: Q. You were on Union street going west. What was your course? --A. Well, I was going home then.

Mr. Farris: Q. Well, were you going actually home then or were you going down to the Dominion Hotel to get your friend Reggy home? --A. Well, I was going to take Reggy home, Yes.

Q. And that was not in the direction of your home? A. No.

Q. And so you were not going home at that time at all? A. No.

Q. You were going in an opposite direction from going home at that time? A. Yes.

The learned trial judge stated that he did not accept Claude's evidence that he was going to the Dominion Hotel, but did believe that he was going home. Of course he was going home in the sense that he intended eventually to arrive there but in our opinion the evidence that he was at the time of the accident taking Fred Reggy back to his hotel is too strong to permit of its being gainsaid. This is not a case of deciding as between the credibility of different witnesses; it is only the credibility of Claude Thomas that is in question, and, as for deciding which part of his story is the more probable, an appellate judge is in as good a position as the judge at the trial. In his judgment in the court below, Mr. Justice Martin called attention to a recent English case, Harrington v. Shuttleworth & Co., which is not reported, but of which a note appears in 171 L.T. Jo. (24th January, 1931), which seems to us to uphold the principle laid down in Mitchell v. Crassweller. There the chauffeur had driven the company's managing director to the Carleton Hotel and, on his way back to the garage, instead of taking one of the orthodox routes, he made a detour of two miles out and two miles back to pick up the young lady to whom he was engaged. During the course of that detour he injured the plaintiff through his negligent driving. Lord Justice Scrutton held that the detour was not in the course of the man's employment and was a frolic for which the employer could not be held liable.

In the case before us the duty of Claude Thomas was to drive the truck home after delivering the milk. Instead of doing that he made an independent journey out to Smith's and back, in the course of which the appellant was injured by his negligent driving. For the consequences of that negligent act, the respondent, in our opinion, cannot be held liable. We, therefore, agree with the court below and dismiss the appeal with costs.

Appeal dismissed.

[O'Connor J. in Braun v. The King, [1947] 1 D.L.R. 752 (Exch.Ct.) with reference to the Battistoni case said: "It is quite clear from the judgment that the frolic ended at the Dominion Hotel and at that point the driver again entered upon the master's business. Therefore, to re-enter upon the service of the master, it was not necessary for the driver to go south to the dairy, or to reach a point on the route between the dairy and the farm. Once the driver started to return home from the Dominion Hotel, although he was still some distance north of the dairy and also north of the route between the dairy and the farm, he was then on his master's business." He, accordingly, held that a servant employed to collect and dispose of garbage and who, after disposing of the garbage, drove away from his place of employment to a brewer's warehouse to obtain a refund on empty bottles, re-entered his employment when he left the warehouse with the intention of returning to his place of employment. See also Merritt v. Hepenstal (1895), 25 S.C.R. 150.]

NEWMAN v. TERDIK [1953] 1 D.L.R. 422 (Ont.C.A.)

The judgment of the Court was delivered by

F. G. MacKay J.A.:—This is an appeal from the judgment of Smily J. dismissing the action, which is for damages resulting from an automobile accident.

The facts are fully set out in the judgment of the learned trial Judge and may be briefly summarized as follows: The defendant was the owner of an automobile which was at the time of the accident being driven by one Perkinson. It was admitted that the negligence of Perkinson in the operation of the automobile was the sole cause of the accident which caused the injuries of the plaintiffs and the damage to the automobile of the plaintiff Maurice Newman.

The defendant, Terdik, was the owner of a tobacco farm on which there were two groups of kilns for drying tobacco. The two groups of kilns were approximately one-half mile apart and there was a farm lane connecting them.

Terdik had employed Perkinson, a United States citizen who ordinarily lived in North Carolina, as a tobacco-curer. The terms of the employment were that Perkinson should be paid his travelling expenses from North Carolina to Simcoe, Ontario, and the expenses of his return to North Carolina after completion of the tobacco-curing, the sum of $90 per week and his board while working for Terdik. He commenced working on August 4, 1951, and September 13, 1951, the date of the accident, was his last day of employment. The tobacco kilns required very frequent inspections. After Perkinson's arrival, he complained that the distance between the two groups of kilns was too far to walk and an arrangement was made with Terdik that he was to have the use of Terdik's automobile to travel between the two groups of kilns.

The learned trial Judge found, on evidence which fully justified these findings:

(1) that Terdik gave Perkinson explicit instructions that he was to use the automobile only on the farm lane between the kilns and that he was not to go on the highway with the automobile;

(2) that, without the knowledge or permission of Terdik, Perkinson on September 13, 1951, while visiting the kilns furthest from the farm buildings, took the automobile on to the highway and proceeded to Simcoe and thence to a point about four miles east of Delhi where the accident occurred; and

(3) that the business on which Perkinson was engaged when he took the automobile away from the farm and became involved in the accident was his own private business and was not in any way connected with his duties as an employee of Terdik.

It was argued by plaintiff's counsel, both at the trial and on appeal, that the defendant was liable on three grounds:

(a) that Perkinson was an employee of Terdik at the time of the accident;

(b) that Perkinson was the chauffeur of Terdik within the meaning of s. 50 of the *Highway Traffic Act*, R.S.O. 1950, c. 167; and

(c) that under s. 50, Perkinson having obtained possession of the car with the consent of the owner Terdik, the owner was liable for any damage caused by the negligent operation of the car while it was in Perkinson's possession irrespective of whether it was being used or operated contrary to the owner's express instructions.

The learned trial Judge found against the plaintiffs on all of these grounds.

In regard to the first ground, the plaintiffs clearly cannot succeed once it has been held that he was not acting in the course of his duties as an employee of the owner at the time of the accident.

The second proposition is also untenable on the facts of this case. Perkinson was being paid as a tobacco curer. The use of the car was only incidental to his employment and he was not receiving any additional wages or compensation for the operation of the car: *D'Alessandro* v. *Minden,* [1943], 4 D.L.R. 259, O.R. 418.

On the third ground, the plaintiffs' argument is that Perkinson's original obtaining of possession of the car on the morning in question having been with Terdik's consent, and his possession of it having continued without any break up to the moment of the accident, he was in possession of it with the defendant's consent so as to make the defendant liable under s. 50 of the *Highway Traffic Act,* even though the defendant had not consented to the particular manner of its operation at the time, that is, to its being operated by Perkinson on a public highway.

It was argued that, because prior to 1929 the predecessor section of the present s. 50 of the *Highway Traffic Act* contained the words "at the time of such violation", (a) all decisions prior to 1930 were obsolete, and (b) the deletion of these words showed a clear intent of the Legislature that the owner's consent need not relate to the time of the accident or the manner of operation of the car at that time but was a sufficient consent if it related only to the time when the driver obtained possession of the motor car.

I do not think that the deletion of these words affected the meaning of the section. Prior to 1929 s. 41 of R.S.O. 1927, c. 251, made the owner liable for penalties under the Act and also made him liable for damages provided they arose by reason of a violation of the Act or Regulations. From 1930 on there were separate sections dealing with liability of the owner for penalties and his liability for damages. These sections are now ss. 49 and 50 of the present *Highway Traffic Act.* The words "at the time of the violation" are still contained in s. 49. It is obvious that the word "violation" is not appropriate for use in s. 50 as there may be civil liability without breach of any specific provision of the Act or Regulations.

Section 50 deals only with liability for damages arising by reason of the negligent operation of a motor car *on a highway.* Used in this context, the words "without the owner's consent in the possession of some person other than the owner or his chauffeur".can only be referable to possession on a highway.

That the deletion of the words "at the time of the violation" did not affect the meaning of the section was the view taken by Masten J.A. in his dissenting judgment in the case of *Thompson* v. *Bourchier,* [1933], 3 D.L.R. 119 at pp. 122-3, O.R. 529 at p. 533, where he said:

"While s. 41(*a*) does not contain the words 'unless at the time of such violation,' yet nevertheless, in my opinion, the crucial moment is the instant when the negligence occurs . . . .

"Further reasons for the view which I have expressed arise from the consideration of the words of the statute itself. The statute creates liability in the owner only 'by reason of negligence in the operation of such motor vehicle *on a highway.*'" (The italics are mine.)

The other members of the Court in that case did not deal with this point as it was held that there was consent to drive on a highway.

The meaning of the word "possession" was discussed in *Thompson* v. *Bourchier* and recently in *Marsh* v. *Kulchar,*

[1952], 1 D.L.R. 593, 1 S.C.R. 330. I think it is clear from the reading of these cases and of *Hirshman* v. *Beal* (1916), 32 D.L.R. 680 at pp. 689-90, 28 Can. C.C. 319 at pp. 328-9, 38 O.L.R. 40 at p. 51, that possession can change from rightful possession to wrongful possession, or from possession with consent to possession without consent, without any change in the actual physical possession of the chattel. In *Hirshman* v. *Beal* Masten J.A. refers to the definition of theft as set out in s. 347 of the *Cr. Code*, particularly s-s. (4), which is as follows: "It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting."

This was also the law in cases of conversion under the common law.

Whether the owner of a motor car has satisfied the onus of showing that his car at the time of the accident was on the highway in the possession of some other person without his consent is a question of fact to be determined on the evidence in each case, and in this case I think the learned trial Judge, on the evidence that Terdik not only had not consented to Perkinson using his car *on the highway* but had expressly forbidden such use, was right in holding that there was no consent to the use of his motor car within the meaning of s. 50 of the *Highway Traffic Act*.

In coming to these conclusions, I have read the following cases referred to us by counsel in the course of argument: *Le Bar* v. *Barber*, [1923] 3 D.L.R. 1147, 52 O.L.R. 299; *Hirshman* v. *Beal, supra; Wainio* v. *Beaudreault*, [1927] 4 D.L.R. 1131, 61 O.L.R. 356; *Kuhmo & Laakso* v. *Helberg*, [1931], 4 D.L.R. 323, O.R. 630; *Thompson* v. *Bourchier, supra; Vancouver Motors U-Drive Ltd.* v. *Walker*, [1942], 4 D.L.R. 399, S.C.R. 391; *Mowe* v. *Perraton*, [1952] 1 All E.R. 423; *Lloyd* v. *Milton*, [1937] 3 W.W.R. 504; [1938], 3 D.L.R. 702, S.C.R. 315; *Sebzda* v. *Hupka*, [1950], 2 D.L.R. 185; *D'Alessandro* v. *Minden, supra; Clayton* v. *Raitar Transport Ltd.*, [1948], 4 D.L.R. 877, O.R. 897; *Lockhart* v. *Stinson & C.P.R.*, [1941], 2 D.L.R. 609, S.C.R. 278, 52 C.R.T.C. 161; affd [1942], 3 D.L.R. 529, A.C. 591, 54 C.R.T.C. 321; *Laycock* v. *Grayson* (1939), 55 T.L.R. 698; *W. W. Sales Ltd.* v. *Edmonton*, [1942], 4 D.L.R. 196, S.C.R. 467; *Bickell* v. *Blewett* (1931), 40 O.W.N. 136; *Hamilton* v. *Rodgers*, [1949] O.W.N. 156; *Herron* v. *Langford*, [1949] O.W.N. 753; *Battistoni* v. *Thomas*, [1932], 1 D.L.R. 577, S.C.R. 144; *St. Helens Colliery Co.* v. *Hewitson*, [1924] A.C. 59; *Goh Choon Seng* v. *Lee Kim Soo*, [1925] A.C. 550; *Moreau* v. *Labelle*, [1934] 1 D.L.R. 137, [1933] S.C.R. 201; *Bennetto* v. *Leslie*, [1950] O.R. 303; *Malbouf* v. *The King*, [1948], 4 D.L.R. 171, Ex. C.R. 523; *Marshall* v. *Mulvie*, [1937] O.W.N. 690, and *Walker* v. *Martin*, 45 O.L.R. 504.

The plaintiffs also appeal on the ground that the damages awarded were inadequate. On the evidence I cannot find that the learned trial Judge erred in principle in awarding the general damages he did and, although they seem somewhat low having in mind the very serious injuries suffered by the plaintiffs, they are not so inadequate as to warrant interference by the Court.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

The legislation discussed in this case is now Highway Traffic Act, R.S.O. 1970, c. 202, s. 132(1)

132.—(1) The owner of a motor vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle not being the owner is liable to the same extent as the owner. R.S.O. 1960, c. 172, s. 105 (1). Liability for loss or damage

TWINE v. BEAN'S EXPRESS, LIMITED. Court of Appeal. 1946. 62 T.L.R. 458.

This was the appeal of the plaintiff, the widow and legal personal representative of a man who was killed as the result of an accident, from the decision of Mr. Justice Uthwatt, sitting as an additional Judge of the King's Bench Division, in an action in which the plaintiff claimed damages against the defendants, Bean's Express Limited, under the Fatal Accidents Acts, 1846 to 1908, for the benefit of herself and her two infant children, and under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of her husband's estate.

By an arrangement between the defendants and the Post Office Savings Bank the defendants provided for use by the bank a commercial van and a driver--Harrison--on terms that the driver of the van remained the servant of the defendants it being part of the bargain between the defendants and the bank that the defendants accepted no responsibility for injury suffered by persons riding in the van who were not in the employment of the defendants. The standing instructions to the defendants' drivers, which had been duly brought to the attention of Harrison, provided that no persons, (with certain exceptions not applicable in this case) were allowed to travel on the company's commercial vehicles.

On April 6, 1944, Twine, a mail porter employed by the bank, who had occasion in the course of his duties to go from the bank's headquarters at Hammersmith to a branch office in Kensington, took a lift back from the branch in the van which was duly engaged on an authorized journey. Twine did so with the assent of the driver, but was not authorized by the bank to travel on the van. He had in fact drawn 3d. to cover his bus fare to the branch and back. He had travelled on the van on several previous occasions. There was at all material times on the dash-board of the van a notice: "No unauthorized person is allowed on this vehicle. By order. Bean's Express, Limited", and on the roof of the van, above the driver's seat, another notice stating that drivers had instructions not to allow unauthorized travellers on the van, and that in no event would the defendants be responsible for damage happening to them. The driver had, on the occasion of a former ride in the van by Twine, told him, in substance, that he travelled at his own risk. Owing to the negligent driving of the driver, an accident occurred resulting in Twine's death.

Mr. Justice Uthwatt held that the defendants owed no duty to the deceased man and that the action accordingly failed. The plaintiff appealed.

LORD GREENE, M.R. The plaintiff can, of course, only succeed if she can show that her husband's unfortunate death was due to a breach of duty which the defendants owed towards him. The fact that the driver of the van owed a duty to her husband cannot help her in these proceedings. In my opinion the case is a clear one. The deceased man was on the defendants' van in circumstances in which the Judge has found (and I do not see that he could have found otherwise)

that he had no right to be there at all, and the driver of the van had no right to take him on to the van. Only limited classes of persons with properly authenticated authority were entitled to be carried on the van, and it is as clear as possible that the deceased man was not one of those persons....

That being so, it seems to me there is an end of the matter, because if the question is asked: Was the driver, in giving a lift to the deceased man, acting within the scope of his employment? the answer is clearly, No. He was doing something which he had no right whatsoever to do, and qua the deceased man he was as much on a frolic of his own as if he had been driving somewhere on some amusement of his own quite unauthorized by his employers. His employers are Bean's Express, Limited, and part of the confusion which has arisen in the argument is caused by treating the driver of the van as though he was in some way employed by the Post Office. He was not. He was the employee of the independent contractors, and when he ran into the omnibus (which was the cause of the deceased man's death) he was acting as a driver of the van in the course of his employment. He was employed to drive the van. That does not mean, as Sir Charles Doughty suggested, that because the deceased man was in the van it was within the scope of the driver's employment to be driving the deceased man. He was in fact doing two things at once. He was driving his van from one place to another by a route which he was properly taking when he ran into the omnibus, and in driving the van he was acting within the scope of his employment. The other thing which he was doing simultaneously was something totally outside the scope of his employment--namely, giving a lift to a person who had no right whatsoever to be there.

In my opinion, once the facts are understood, the case is a perfectly simple one, and there is only one answer to it. The appeal must be dismissed.

[Morton and Tucker L.JJ. concurred.]

CANADIAN PACIFIC RAILWAY COMPANY v. LOCKHART. Privy Council. [1942] A.C. 591; 3 D.L.R. 529.

LORD THANKERTON. This appeal concerns solely the responsibility of the appellant for injuries received by the infant respondent owing to the negligent driving of a motor car owned and driven by one Stinson, employed by the appellant as a carpenter and general handy-man. The action, which was directed against Stinson and the appellant, was tried before Rose C.J.H.C. and a jury in January, 1939. The jury found that the accident was caused by Stinson's negligence and assessed the damages at $10,000 to the respondent and $500 to his father. No question was left to the jury as to the liability of the appellant, and the learned Judge directed judgment to be entered against Stinson, and reserved judgment as to the appellant's liability; on July 12, 1939 [[1939] O.R. 517], the learned Judge dismissed the action as against the appellant, holding that the driving of the motor car was not in the course or within the scope of Stinson's employment by the appellant. An appeal by the respondent was dismissed by the Court of Appeal for Ontario on December 15, 1939 [1940] O.R. 140] by a majority of four to one. On a further appeal by the respondent, the Supreme Court of Canada, on April 4, 1941 [[1941] S.C.R.278] unanimously allowed the appeal, and directed judgment to be entered for the respondent against the appellant for the amount awarded by the jury. Hence the present appeal by the appellant.

Their Lordships are content to take the material facts, which are not in dispute, from the judgment of Rose C.J.H.C., who tried the case, as follows:

"The defendant Stinson had been for many years in the defendant company's service. It is in the course of his employment to make repairs of many kinds to the company's property, movable and immovable. His immediate superior is the foreman of the bridge and building department at the company's works at West Toronto, and his own headquarters are at those works, but his duties take him from time to time to other premises of the company in and out of Toronto, all of which can be reached by the company's lines of rails.

"At West Toronto, Stinson had made a key for use in a lock in the station at North Toronto. He had made it from a pattern, and he was authorized or instructed by his foreman to go to North Toronto and try it in the lock. He is paid by the hour, and would have been paid for the time occupied in the journey.

"The Company keeps at West Toronto vehicles of three types for the use of the employees in connection with their work; a 'speeder', a 'track-motor', and a 'hand-car', all of which run on the company's rails; and sometimes, when it is more convenient, a man proceeding from one part of Toronto to another is instructed or permitted to travel by tram-car and is furnished with tickets. On this occasion

nothing was said as to how Stinson was to get to NorthToronto; but the track-motor and the speeder were in the shop, available for use, and the foreman assumed that the track-motor would be used. Stinson, however, had a motor-car of his own nearby, and, without communicating his intention to any one, he decided to use it. He did use it, and on his way to North Toronto he injured the infant plaintiff.

"The Company, by its divisional superintendent, and over his signature, had issued two notices concerning the use by its employees of privately owned motor-cars in connection with the Company's business. The first, dated December 28, 1937, was as follows:

"'ALL CONCERNED:

"'The use by employees of their own cars in connection with the Company's business has been forcibly brought to our attention by possible heavy claims against the Company in recent accidents, and, after a check up of the situation it develops that a large number of such employees do not carry public liability or property damage insurance. As a continuance of this practice is likely to seriously involve the Company, privately owned automobiles are not to be used in connection with the Company's business unless the owner carries insurance against public liability and property damage risks.

"'Please be governed accordingly.'

"And the second, dated March 21, 1938 (i.e., just less than four months before the accident which gave rise to this action), was as follows:

"'ALL CONCERNED:

"'Referring to my circular letter of December 28th, 1937, regarding the use of privately owned automobiles not covered by insurance in the execution of Company's business.

"'Since then, several instances have come to notice where employees had used unprotected automobiles contrary to the instructions. In one case, a telegraph messenger undertook to use an automobile while his bicycle was undergoing repairs, and had the misfortune to strike and injure a prominent citizen. As a result a heavy claim has been preferred against the Company on the grounds that the messenger was transacting company's busir ss at the time.

"'It is a serious matter to involve the Company in expenditures of this nature, and all concerned must clearly understand that automobiles not adequately protected by insurance must not be used in the execution of Company's business.

"'Will you kindly take whatever steps are necessary to see that the instructions in this regard are being adhered to.'

"Copies of these notices had by the foreman at West Toronto been read to his men, including Stinson, and had been posted up and left posted in a prominent place for all to see; and Stinson's attention had very directly been called to the order on one occasion when an act of disobedience on his part had come to the foreman's attention. This one breach of the order by Stinson seems to have been the only breach on the part of any of the men who were under the orders of the foreman at West Toronto which had come to his (the foreman's) attention; and there is no possibility of finding that the company or any of Stinson's superiors in the company's service had winked at the non-observance of the rule. Had there been evidence upon which such a finding could be based, a question as to the fact would have been submitted to the jury. Stinson carried no insurance, and when he set out for North Toronto in the uninsured car he knew he was doing what he had been forbidden to do."

After reviewing the authorities, the learned Judge said (p. 602): "In the present case, to say that it was a duty of the defendant Stinson to go to North Toronto, that he went negligently and by his negligence caused damage, and, therefore that his master is liable, is to make a plausible, but, in my opinion, an inaccurate statement. After much consideration, my opinion is....that the driving of a privately-owned and uninsured motor-car was not an act falling within the class of acts which Stinson was authorized to perform, and, therefore, that his negligence in the handling of such a car, even at a time when he was engaged in his master's business, does not bring his master under liability. It may--indeed, it seems probable--that from the notices posted up there is to be inferred a permission to drive insured cars; but I do not think that the case can be dealt with upon the footing that there was a general authority to drive motor-cars, coupled with an instruction to see to it that every car driven was adequately covered. The company having provided means of transport, I think it was not in the course of Stinson's employment to provide other means which he happened to prefer; and that, even if, from the notices, a permission to drive an insured car was to be inferred, that permission was not effective to bring the driving of an uninsured car within the scope of the employment."

The learned Judge accordingly dismissed the case as against the defendant Company, and an appeal by the plaintiffs was dismissed by the Court of Appeal for Ontario on December 15, 1939, by a majority of four Judges to one, Masten J.A., in whose judgment on this point Middleton and Gillanders JJ.A. concurred, said, after a reference to the two circular notices, which were brought to Stinson's attention:

"Some time later Stinson, without placing insurance on his car, used it again in disobedience of the respondent's prohibition. This occurrence came to the notice of McLeod and Stinson was summoned by McLeod and reprimanded. The details of that interview do not appear in the evidence. He was not dismissed but remained in respondent's employ. McLeod had not authority to discharge him. But if Stinson, at that interview with his superior officer, had refused to be debarred from going to work in his uninsured motor, there could have been only one result, viz., his dismissal. There can be only one inference drawn from the continuance of his employment, viz., that the scope of

his employment was thereafter, by his consent, definitely limited by excluding any right to travel to his work in his own motor so long as it remained uninsured.

"When on the date of the accident in question he set out for his work by driving his uninsured car, he violated the terms of his implied agreement, disobeyed the prohibition of his employer and was guilty of wilful misconduct for his own convenience and purpose. In my opinion, the act of setting out on his journey in his uninsured car placed Stinson outside the scope of his authority so that he was acting not as a servant of the railway, but as a stranger engaged on his own enterprise."

Fisher J.A. held that Stinson, by disobedience of his instructions, in operating his uninsured motor vehicle out in the street clearly placed himself during that period out of the control of his master, and his act was in truth his own act, and not his master's, and his act was not only outside the course and scope of his employment, but had the effect of placing himself beyond the control of his master. McTague J.A., who dissented, after a review of the cases, stated:

"In applying the principle to the present case, it seems perfectly clear that in transporting the key from West Toronto to North Toronto Stinson was about his master's business. Did he, because of the mode of transportation which he used, divest himself of the character of servant and become a stranger to his employer? I do not think so. If in the course of his trip he had gone off on a venture of his own and injured someone, it might well be said that in doing that he had lost his character of servant. On the occasion in question here he was not using a means of transportation which in itself was prohibited. He was merely disobeying an injunction of his employer that he should insure his car and thus, at his own expense, provide practical indemnity to his employer for liability to third persons. Disobedience by the servant may be a cause for dismissal by the master, but in se is not a defence to liability of the master to third persons under the doctrine of respondeat superior."

On appeal, this decision was unanimously reversed by the Supreme Court of Canada, on April 4, 1941, and judgment was entered against the Company, who obtained special leave to appeal therefrom to His Majesty in Council. The opinion of Duff C.J.C. and Davis J. was delivered by the learned Chief Justice, who held that the evidence, as it stood, all pointed to the conclusion that the Company's officers were indifferent to the observance of the order contained in the circular notices, and that Stinson, in using his automobile in the Company's service on the occasion in question, had no idea that he was not acting in the Company's service, and, after a discussion of the cases, stated:

"Here Stinson was not only engaged in his master's service at the time he was driving his motorcar, he was performing a duty of the service in getting himself conveyed to the place where it was his duty to go. He was on his master's business in conveying himself there by his car,

unless the respondent's contention is sound that by reason of the order and the absence of insurance his act in driving his car on the company's business was of such a character, as already observed, as to sever the relationship of service. That I have dealt with."

The judgment of Rinfret and Kerwin JJ. was delivered by Kerwin J. who held that he was entitled to draw the inference from the facts that Stinson had not severed his relations with his employer, the railway company, that he was performing his duty to his master in going to North Toronto, and was using a conveyence of a kind at least impliedly authorized and was acting within the scope of his employment. Crocket J., after referring to the cases, says:

"If the question were not concluded by the undisputed and indeed the admitted fact that Stinson was using his car in journeying to the North Toronto Station in connection with and in furtherance of his master's business, I should have thought that the only possible inference from the district superintendent's circular letters, on which the judgment a quo is entirely based, was that he and all other employees in the Toronto district were thereby authorized to use their own or any other privately owned cars in connection with their master's business, provided that they were insured against public liability and property damage. It was thus in no sense a definite prohibition against the use of motor cars in connection with the respondent's business, but a purely conditional or contingent prohibition apparently made for no other purpose than that of transferring from the master to the automobile insurance companies the obligation of paying for injuries resulting to third persons from the negligence of its servants while engaged in the prosecution of its business, and one which clearly recognized the right of the respondent's employees to use motor cars so insured for that purpose. I should have had no hesitation in holding that a prohibition of such a character could not, under the law as recognized by this Court in accordance with the principles laid down by the House of Lords and the Judicial Committee of the Privy Council, have the effect of so curtailing the scope of Stinson's employment, in the capacity of a permanent general repairs man, as to transform his act in using his uninsured car solely for the purpose of his master's business on the occasion in question into an act undertaken wholly for his own personal gratification and having no relation to his employment as his master's servant."

Their Lordships agree with the decision of the Supreme Court, and in particular with the reasons given by Crocket J., as also with the reasoning of McTague J.A. in his dissenting judgment in the Court of Appeal, in the passages already quoted. There is little dispute as to the facts, but their Lordships prefer to proceed on the statement of the learned trial Judge that there was no evidence on which it could be found that the Company had winked at the non-observance of their prohibition, rather than on the view expressed by some of the learned Judges of the Supreme Court to a contrary effect.

The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles their Lordships agree with the statement in Salmond on Torts (9th ed.), p. 95, viz.: "It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts that he has authorised that they may rightly be regarded as modes--although improper modes--of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it...On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

The well-known dictum of Lord Dunedin in Plumb v. Cobden Flour Mills Co., [1914] A.C. 62 at p. 67, that "there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment", may be referred to. Their Lordships may also quote passages from the judgment of this Board in Goh Choon Seng v. Lee Kim See, [1925] A.C. 550, which was delivered by Lord Phillimore, at p. 554: "The principle is well laid down in some of the cases cited by the Chief Justice, which decide that 'when a servant does an act which he is authorized by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorized and improper, in such cases the employer is liable for the wrongful act. . .'

As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads: (1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized had he known of it. In these cases the master is, nevertheless, responsible."

In Goh Choon Seng's case the appellant's servants had been employed by him to burn vegetable rubbish collected on his land, and they burnt some of it by lighting fires on Crown land left waste and uncultivated, which was wedged in between the appellant's land and that of the respondent, with the result that the fires spread to the respondent's land and caused damage to his property. The appellant was held liable to the respondent.

In the opinion of their Lordships, the present case does not fall under the first head of Lord Phillimore's classification. That the use of his own motor car for the journey might be the more convenient means of transport for Stinson does not alter the fact that he was performing the journey for the purpose of, and as a means of execution of, the work which he was employed to do. In these cases the first consideration is the ascertainment of what the servant was employed to do. The existence of prohibitions may, or may not, be evidence of the limits of the employment. In the present case Stinson was employed to work as a carpenter and general handy-man and for that purpose he required to go from his headquarters at West Toronto Station to other railway buildings of the Company throughout Toronto and district. The means of transport used by him on these occasions was clearly incidental to the execution of that which he was employed to do. He was not employed to drive a motor car, but it is clear that he was entitled to use that means of transport as incidental to the execution of that which he was employed to do, provided the motor car was insured against third party risks. If the prohibition had absolutely forbidden the servant to drive his motor car in course of his employment, it might well have been maintained that he was employed to do carpentry work and not to drive a motor car, and that, therefore, the driving of a motor car was outside the scope of his employment, but it was not the acting as driver that was prohibited, but the non-insurance of the motor car, if used as a means incidental to the execution of the work which he was employed to do. It follows that the prohibition merely limited the way in which or by means of which the servant was to execute the work which he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties.

Their Lordships are therefore of opinion that the appeal fails, and they will humbly advise His Majesty that the appeal should be dismissed with costs as between solicitor and client and that the judgment of the Supreme Court of Canada should be affirmed.

Appeal dismissed.

[In McKean v. Raynor Bros., [1942] 2 All E.R. 650 the defendants instructed their servant to take a certain lorry owned by them and carry a message to a scraper outfit on the highway. The servant used his father's car which he had driven to work that morning and by his negligent driving injured the plaintiff. Defendants were held liable.

Suppose a messenger boy is instructed to use a bicycle only in delivering messages and instead uses an automobile? Recovery against the employer was denied in Western Union Telegraph Co. v. Hinson (1935), 87 W.W. (2d) 66 (Ark.).]

BUGGE v. BROWN. High Court of Australia. 1919. 20 C.L.R.110.

The defendant, a grazier on a large scale, owned, in addition to the home farm, two other large tracts of land. One of these, called McDonald's Paddock, was situated fairly close to the other, called Old Kimbolton. In December he instructed one Winter, a roustabout and general assistant, employed at 15s. a week with keep, to cut thistles in McDonald's Paddock. The distance there being too great for Winter and his companion, Larson, to return to lunch, Mrs. Brown, the defendant's wife, packed a box with food, including raw chops. In collecting up the things to take with him, Winter included a frying pan. Brown asked him what he was going to do with it; to which Winter replied that he was going to use it to cook the chops. To this Brown, taking out the frying pan, replied that he was not to cook at McDonald's paddock, but that he was to go to Old Kimbolton where there was a frying pan and plenty of water. To this Winter assented.

After the morning's work, at lunch time, Winter, instead of going to Old Kimbolton to cook the chops, improvised a gridiron and cooked them at McDonald's Paddock, in an old chimney place which was there. The chimney was in a dangerous condition and the fire escaped, spreading to the plaintiff's land.

At the trial in the Supreme Court of Victoria, the court found that Winter was negligent but that the act of lighting the fire was not within the scope of his employment. From judgment for the defendant, the plaintiff appeals to this Court.

ISAACS J. .....The responsibility of a master for the wrongful act of his servant does not depend merely on the question of authority, express or implied. He may be liable though the act be beyond any authority actually given by him. The expression "scope of authority" in its relevant sense may be wider than the limits of the "authority" itself. Nor does his responsibility rest upon any notion of ostensible authority. Nor does it rest, notwithstanding forms of pleading, upon the doctrine of imputing negligence or other wrongfulness vicariously to the master. The master's responsibility may exist, notwithstanding he proves he has actually forbidden the act. The master's responsibility may even exist where the law itself forbids the act as criminal.

The principle on which responsibility rests is that it is more just to make the person who was entrusted his servant with the power of acting in his business responsible for injury occasioned to another in the course of so acting than that the other and entirely innocent party should be left to bear the loss.

The rule of law founded on that principle is that the master is responsible provided that the servant is acting in "the course of his employment". That phrase and various corresponding phrases, such as "scope of employment", and "sphere of employment" are used to indicate the just limitations of a master's responsibility for the wrongdoing of his servant. We have seen that the narrow view of "limits of authority", whether actual or implied, or even where a definite prohibition against doing the act complained of exists, or where even the law itself forbids the act, does not determine the question of liability to answer for the wrong; for the act complained of may nevertheless be within the

scope of the employment. But the law recognizes that it is equally unjust to make the master responsible for every act the servant chooses to do. The limit of the rule--expressed in the widest form by the phrase "the course of employment" or the "sphere of employment"--is when the servant so acts as to be in effect a stranger in relation to his employer with respect to the act he has committed, so that the act is in law the unauthorized act of a stranger.

The act of the servant complained of is regarded as outside the relation and as that of a stranger; (a) if he did not assume to act within the scope of his employment; or (b) if what he did was a thing so remote from his duty as to be altogether outside of, and unconnected with his employment.

A prohibition, either as to manner, or as to time, or place, or even as to the very act itself, will not necessarily limit the sphere of employment so as to exclude the act complained of, if the prohibition is violated.

An instruction or a prohibition may, of course, limit the sphere of employment. But to have that effect it must be such that its violation makes the servant's conduct complained of so distinctly remote and disconnected from his employment as to put him qua that conduct virtually in the position of a stranger.

....When proper regard is had to the legal considerations to which I have referred, the question whether a given act of a servant is or is not within the course of employment is a question of fact dependent entirely upon the circumstances of the particular case....

As to the facts. Winter says that he made a gridiron so as not to waste time. It is quite plain that it did save time; it saved Winter's time and Larsen's time. But their time was their employer's time, too. Energy spent in harnessing up and driving over, and driving back and unharnessing, was profitably saved in the interest of master and man. Hungry and tired men are none the worse for an earlier meal and more rest in the interval between the morning and the afternoon hours of labor. And the employer gets the benefit of this also. The meal at the old chimney was no "excursus" of the servant; it was not a "frolic of his own". It was something purporting to be done in the line of the servant's employment. And it was not so remote from the employment as directed that Winter can be regarded as a stranger or intruder on McDonald's Paddock in lighting that fire, or as having no right to be there at all.

The most that can possibly be said against it, in my opinion, is that it was a disregard of an instruction to cook chops with a frying pan at Old Kimbolton. There was no real difference between such an instruction and one to light a fire at any particular spot in McDonald's Paddock; whether at Old Kimbolton house or in the old chimney of Ferrier's hut, it was a "domestic fire", an act of the same nature, but in the latter place under more risky circumstances. And the same thing could be said if made any spot in the two blocks...

The matter may be simplified in this way. If nothing has been said about the place where the chops were to be cooked, and Winter had simply been given the raw food and sent to McDonald's Paddock to cut the thistles, no doubt can exist that cooking the meal at the old chimney would have been within the sphere of employment. To that, however, was added the "instruction" to perform the act of cooking the chops by means of the frying pan at Old Kimbolton and not at the old dam. That is no more than a specific direction as to the place where the authorized act is to be done, and the place where it is forbidden to be done.

So far as it relates to the sphere of employment, the act authorized (that is, authorized in the broad and liberal sense that it was authorized to be done somewhere on respondent's farm, though not strictly authorized to be done in the place where it was done), having regard to the main immediate object, namely, the sustenance of the farm laborers for their day's work, was "the cooking of the chops" and also of the other food--in other words the making of the fire for cooking. The place where the act was directed to be done was Old Kimbolton, and not the old dame; but the act was not inseparable from Old Kimbolton. Indeed, the very prohibition to do the act of cooking at the old dam connotes that the act authorized is the simple act of cooking, and that the place is not an essential part of the act...

Judgment reversed, and judgment entered for the plaintiff.

[See also Murdoch v. Cons. Mining, Smelting & Power Co. Ltd., [1928] 1 D.L.R. 853 (B.C.).]

[For a criticism of the cases proceeding on the doctrine of an "implied authority" of a servant, see Baty, Vicarious Liability, chap.V. "Authority to Commit Wrongs". "It is not the 'authority' but the functions, of a servant which are the true ground of liability. It is precisely when he departs from his 'authority' while remaining in his functions, that a servant becomes most dangerous."--Baty, p. 108. Cf. Martin B. in Seymour v. Greenwood (1861), 6 H. & N. at 364: "There are many cases, of which Roe v. Birkenhead (1851), 7 Ex.36 is one, in which the liability of the master is put as resting upon the relation of principal and agent (i.e. as depending upon authority); but in reality it depends upon the relation of master and servant (i.e. upon scope of employment). If an act is done within the scope of the servant's employment, and is done in the master's service, an action lies against the master and the master is liable even though he has directed the servant to do nothing wrong."]

LLOYD v. GRACE, SMITH & CO. House of Lords. [1912] A.C.716.

Action to recover property or its value taken from the plaintiff by the fraud of the defendant's servant.

The plaintiff, a widow, being dissatisfied with the income from her cottages at Ellesmere Port and from a mortgage on other property, and wishing to find a more profitable investment, went to the office of the defendant, Frederick Smith, then the sole member of Grace, Smith & Co., a firm of solicitors. There she saw one Sandles whom she thought to be a partner, but who was the managing clerk who conducted all of the conveyancing business of the defendants without supervision. Acting on his advice, she directed him to sell the cottages and call in the mortgage. Telling her that it was necessary for her to sign some papers in order to accomplish this, Sandles got her to sign two documents which she did not read but which turned out to be conveyances to Sandles, individually. On the second day, discovering that the receipt which Sandles had given her had only his personal signature, she wrote revoking her instructions and soon after obtained from Sandles a receipt for the deeds, signed in the name of the firm.

Sandles at once called in the mortgage and disposed of the proceeds. He pledged the Ellesmere property for a debt of his own.

At the trial before Scrutton, in answer to specific questions, the jury found:

(1) That Sandles professed to act as conveyancing manager of the defendants. (2) That he was in fact acting for his own account and benefit. (3) That in receiving the deeds, he was acting in the course of his master's business, but not for his master's benefit. (4) That in taking a conveyance of the Ellesmere Port property and pledging it he was not acting in the course of his master's business or for his benefit. (5) That in taking a transfer of the mortgage to himself he did not act in the course of his master's business or for his benefit. (6) That in calling in the mortgage debt and transferring it he acted in his master's business but not for his benefit. The jury also found that the plaintiff thought she was dealing with Grace, Smith & Co. only.

In accordance with an agreement by the parties that the trial judge might make supplementary findings of fact, Scrutton found: that it was within the scope of Sandles' authority to advise clients as to the best legal way of transferring property and as to the documents to execute; that the plaintiff relied on his representation that the documents she signed were necessary to facilitate the sale; that she did not know she was signing conveyances to him outside the scope of his authority; that she knew she was signing something affecting her estate; that she was justified in relying on Sandles' representations without reading the documents she signed.

On these findings, and disregarding the first part of the jury's finding upon (6) as being unsupported by evidence, Scrutton gave judgment for the plaintiff. This was reversed by the Court of Appeal, Vaughan Williams L.J. dissenting. The defendant appeals to this court.

EARL LOREBURN . . . It is clear to my mind, upon these simple facts, that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorized to receive deeds and carry through sales and conveyances, and to give notices on the defendant's behalf. He was instructed by the plaintiff, as the representative of the defendant's firm--and she so treated him throughout--to realize her property. He took advantage of the opportunity so afforded to him as the defendant's representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal.

LORD MACNAGHTEN . . . The first line of defence set up by Mr. Smith was that Mrs. Lloyd was not a client of the firm at all, but a personal friend of Sandles, and that the transaction was a private deal between Mrs. Lloyd and Sandles. It is enough to say that there is no foundation for this defence. It was negatived by the jury in their answer to the first question and in the rider which they added their special verdict. Sandles, no doubt, was playing a double game. To Mrs. Lloyd he was Grace, Smith & Co.; to the clerks in the office Mrs. Lloyd's visits were the private visits of a personal friend.

The other line of defence, which found favour with the Court of Appeal, requires more consideration. It was rested on the fact that the fraud was committed, not for the benefit of the firm, but for the benefit of Sandles himself. It was contended that Barwick's Case is an authority for the proposition that a principal is not liable for the fraud of his agent unless the fraud is committed for the benefit of the principal.

Barwick v. English Joint Stock Bank, L.R. 2 Ex.259, is no doubt a case of the highest authority. It was decided in the Exchequer Chamber, and the judgment was delivered by Willes J. But I agree with my noble and learned friend Lord Halsbury that the case has been misunderstood in late years, and that it does not decide any such proposition as that for which it was cited in the Court of Appeal. It decided two things. It decided that the learned trial judge was wrong in nonsuiting the plaintiff. It also decided that if on a new trial the jury should come to the conclusion that the agent of the bank had in fact committed the fraud, which in the pleadings was charged as the fraud of the bank, then the principal, though innocent, having received the proceeds of the fraud, must be held liable to the party defrauded. And I think it follows from the decision, and the ground on which it is based, that in the opinion of the Court a principal must be liable for the fraud of his agent committed in the course of his agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not.

Now it must be remembered that in 1867, when Barwick's Case was decided, there was some difference of judicial opinion on the question whether an innocent principal was liable for the fraud of his agent, even when he had received the benefit of the fraud. In Barwick's Case the agent committed the alleged fraud, if he did commit it, for the benefit of his principals. It may be that he was indirectly acting for his own benefit. He may have wished to recommend himself to his principals by astuteness and zeal in their service, or he may have intended to make amends for over-confidence in an impecunious customer; but the direct pecuniary benefit was the benefit of the principals. It must also be remembered that in the then recent case of Udell v. Atherton, by an equal division of the members of the Court, an innocent principal succeeded in retaining the benefit of a fraud committed by his agent. Possibly that case in some measure turned, as Cornfoot v. Fowke is said to have turned, on a question of pleading, but certainly one learned judge who was in favour of the defendant, though he held strongly that an innocent principal was not liable in an action of deceit for the fraud of his agent, even though he had profited by it, expressed an opinion that there was no form of action in which liability for vicarious fraud could be established against an innocent principal.

It was, I think, in reference to the facts of the particular case under review, where the fraud, if committed, must have been committed for the benefit of the principal, that Willes J. expressed himself in the language which has been misunderstood. What Willes J. said was this: "The general rule is, that the master is answerable for every such wrong of the servant, or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." To that statement of the law no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of the service, if it be not committed for the master's benefit. Willes J. does not, I think, say anything of the kind. In a sentence immediately preceding the sentence I have quoted, he observes that the question whether the principal is answerable for the act of an agent was settled as early as Lord Holt's time--a general observation not confined to the case where the principal is a gainer by the fraud.

The question as to the meaning and effect of the ruling of Willes J. may, I think, be best ascertained by reference to a few cases in which some of the learned judges who took part in the decision in Barwick's Case delivered opinions.

Of the judges who were concerned in Barwick's Case, none were more eminent than Montague Smith J. and Blackburn J. They were second only--if they were second--to Willes J. himself. And their views at least are on record.

The first important case in which the ruling in Barwick's Case was discussed was the case of Mackay v. Commercial Bank of New Brunswick, L.R. 5 P.C. 394. In that case the Judicial Committee reaffirmed the ruling of Willes J. There the fraud was committed for the benefit of the principal. But it was argued by Mr. Benjamin, Q.C. that the appellants in the Privy Council would be entitled to retain the verdict if they had sustained damage from the fraudulent representation of an agent, made within the scope of his authority, even though the principal had not profited thereby. The judgment was delivered by Sir Montague Smith. He observed that their Lordships regarded it as "settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority." He discussed at some length what meaning was to be attached to the expression "the scope of the agent's authority". "There are", says Sir Montague Smith, "some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine. . . it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds: at the same time, it is not easy to define with precision the extent to which this liability has been carried." Then Sir Montague Smith says "The best definition of it. . . is to be found in the case of Barwick v. English Joint Stock Bank", and he quotes the words of Willes J., who, after enumerating instances where the principle had been applied, proceeded as follows: "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

At the conclusion of the judgment, in reference to Mr. Benjamin's argument, his Lordship expresses himself as follows: "It is not necessary to determine whether or not the plaintiffs could have retained their verdict if they had proved only that they had sustained damage from the fraudulent representation of an agent of the defendants made within the scope of his authority, without proof of the defendants having profited thereby."

It is difficult to imagine that Sir Montague Smith would have expressed himself in this manner if he had supposed that the question which he reserves had been already determined in the case of Barwick v. English Joint Stock Bank.

Mackay v. Commercial Bank of New Brunswick was decided in 1874; it was followed in 1877 by Swire v. Francis, 3 App. Cas. 106, a case also in the Privy Council. That was a case in which the principal was held liable for the fraud of his agent, though it was committed for the benefit of the agent himself and not for the benefit of the principal. The judgment was delivered by Sir Robert Collier, but Sir Montague Smith was a party to the judgment.

The only other case with which I will venture to trouble your Lordships is the case of Houldsworth v. City of Glasgow Bank, 5 App. Cas. 317, decided in 1880. In that case, Barwick v. English Joint Stock Bank, Mackay v. Commercial Bank of New Brunswick and Swire v. Francis are referred to at some length, both by Lord Selborne and by Lord Blackburn. Lord Selborne observes, as has been observed in other cases, that the principle of which those cases were decided was a principle not of the law of torts, or of fraud or deceit, but of the law of agency. "The decisions in all these cases proceeded" he said, "not on the ground of any imputation of vicarious fraud to the principal, but because, (as it was well put by Mr. Justice Willes in Barwick's Case 'with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong.'"

Here I must ask your Lordships' particular attention to the fact that in the passage which Lord Selborne quotes from the judgment of Willes J. as explaining the true ground of decision in Swire v. Francis, as well as in Barwick's Case and in Mackay v. Commercial Bank of New Brunswick, the words "and for his master's benefit" are omitted. In the original they follow the words "in the course of his master's business". Unfortunately in the report in 5 Appeal Cases, though the passage is printed as a quotation with inverted commas, the omission is not denoted in the usual way by asterisks. And it seems to have scaped observation. But it is most significant. No one who calls to mind Lord Selborne's extreme accuracy in such matters can doubt that the omission was intentional. If the words omitted had been left standing, the passage would not have been applicable to Swire v. Francis. In Barwick's Case the words are appropriate. In a general statement of the law they are out of place. That this was Lord Selborne's own opinion is evidence. On the words as occurring in Barwick's case Lord Selborne makes no comment. When he comes across the same expression in Lord Cranworth's judgment in Addie's case he gives a note of warning. There it is made part of a general proposition. And Lord Selborne says that the words "may perhaps require some enlargement or explanation." That is quite enough to shew that Lord Selborne was not prepared to accept them as an integral part of the proposition which he considered the true ground of decision in Barwick's case and the two cases which followed it, without some qualification.

Lord Blackburn's view of the judgment in Barwick's case requires no explanation. It is clear enough. After

referring to Barwick's case he expresses himself as follows: "I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This no doubt was a very technical question"; and then come these important words: "the substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud."

That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions "acting within his authority", "acting in the course of his employment", and the expression "acting within the scope of his agency" (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes J. is the best that can be given.

In the case of Udell v. Atherton, Wilde B., afterwards Lord Penzance, in his admirable judgment makes the following observation: "It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this, as a general proposition, I agree. All deceits and frauds practised by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal." In the same case, in a passage which was approved apparently by the Court in Mackay v. Commercial Bank of New Brunswick, Martin B. stated the question to be, "Was his" (the agent's) "situation such as to bring the representation he made within the scope of his authority?" In those passages the true principle is, I think, to be found.

The principle as stated by Lord Blackburn is in accordance with the opinion expressed by Story J. I venture to quote Story's opinion, not only because it is the considered opinion of a most distinguished lawyer, but also because it is cited apparently with approval in the Court of the Queen's Bench, consisting of Cockburn, C.J., Blackburn, Mellor, and Lush JJ., by Blackburn J. himself in a case which occurred in the interval between the date of Barwick's case and the decision in Houldsworth v. City of Glasgow Bank. The passage in the judgment of Blackburn J. as reported in McGowan & Co. v. Dyer, L.R. 8 Q.B. 141, 145, is as follows: "In Story on Agency, the learned author states, in s. 452, the general rule that the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his em-

ployment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.' He then proceeds, in s. 456: 'But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligence of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit.'"

I may observe in passing that although Lord Bramwell held strongly the view that for the fraud of an agent committed for the principal's benefit the principal is not answerable, either in an action of deceit or in any other form of action, yet he seems to think that it follows (as indeed it must follow logically) that if liable in that case the principal must be liable in all cases. For he suggests in Weir v. Bell, 3 Ex.D. 238, 245, that instead of imputing vicarious fraud to the principal such cases as Barwick v. English Joint Stock Bank might be decided on the ground that "every person who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract."

With the most profound respect for Lord Bowen and Lord Davey, I cannot think that the opinions expressed by Lord Bowen in British Mutual Banking Co. v. The Charnwood Forest Ry. Co., 18 Q.B.D. 714, 718, and by Lord Davey in Ruben v. Great Fingall Consolidated, [1906] A.C. 439, 445, in reference to the question under discussion, can be supported either on principle or on authority. In neither case were the opinions so expressed necessary for the decision, and I dissent most respectfully from both.

The only difference in my opinion between the case where the principal received the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent, he cannot approbate and reprobate.

So much for the case as it stands upon the authorities. But putting aside the authorities altogether, I must say that it would be absolutely shocking to my mind if Mr. Smith were not held liable for the fraud of his agent in the present case. When Mrs. Lloyd put herself in the hands of the firm how was she to know what the exact position of Sandles was? Mr. Smith carries on business under a style or firm which implies that unnamed persons are, or may be, included in its members. Sandles speaks and acts as if he were one of the firm. He points to the deed boxes in the room and tells her that her deeds are quite safe in "our" hands. Naturally enough she signs the documents he puts before her without trying to understand what they were.

Who is to suffer for this man's fraud? The person who relied on Mr. Smith's accredited representative, or Mr. Smith, who put this rogue in his own place and clothed him with his own authority? If Sandles had been a partner in fact, Mr. Smith would have been liable for the fraud of Sandles as his agent. It is a hardship to be liable for the fraud of your partner. But that is the law under the Partnership Act. It is less a hardship for a principal to be held liable for the fraud of his agent or confidential servant. You can hardly ask your partner for a guarantee of his honesty; but there are such things as fidelity policies. You can insure the honesty of the person you employ in a confidential situation or you can make your confidential agent obtain a fidelity policy.

With all respect to the learned judges of the Court of Appeal, I think the decision appealed from is wrong. I think they are in error as regards the law, and I think they have not taken the correct view of the facts. They look at the execution of the deeds by which Sandles cheated Mrs. Lloyd out of her property as if it were an isolated transaction--as a thing standing by itself; whereas the trick was so cunningly contrived as to seem to the victim of the fraud a mere matter of course--a trifling incident in the business about which the firm was being employed.

In the result I am of opinion that Mr. Frederick Smith was clearly liable for the fraud of his agent.

Order of the Court of Appeal reversed and judgment of Scrutton J. restored.

[The following Law Lords gave concurring judgments: Earl of Halsbury, Lord Atkinson, Lord Shaw of Dunfermline.]

BAMERT v. Parks (1965) 50 D.L.R. (2d) F.2d. 167 (1968)

CLUNIS, CO.CT.J.:—Counsel submitted at the opening a statement of facts on which they had agreed but in addition evidence was called and I, therefore, deem it necessary to make a finding of fact.

The defendants, William and Emily Parks, carried on a car washing business on Langlois Ave. in the City of Windsor under the name of Spee-Dee Auto Wash. The business was managed by the defendant Marvin Parks. The premises in which the washing business was carried on comprised a building and parking lot. The interior of the building housed three "lines" for washing cars and trucks and an office area. A door opened from the street to the office and another door opened from the office to the remainder of the building. There were other doors to the building of a size to permit cars and trucks to enter. The doors other than the outside office door were secured from the inside. It follows that when the premises were closed, a person could enter the building only if he had a key to the office door. At all material times there were three keys to this office door. One was in the possession of the defendant Emily Parks, one was kept by the defendant Marvin Parks, and a third had been given to an employee, Kenneth Miller, by the defendant Marvin Parks.

On the night of November 7, 1962, the defendant Marvin Parks closed and locked the premises for the day at about 6 o'clock in the evening.

On the afternoon of November 7th, the plaintiff brought his car to the premises and gave instructions to the defendant Marvin Parks that it be washed and simonized. The simonizing could not be completed before closing and the plaintiff was advised that it would be done by about noon of November 8th. This meant that the car was to be kept by the defendants William and Emily Parks in their premises overnight and made available to the plaintiff after the simonizing had been done about noon of the following day.

On the afternoon of November 7th, the defendant Marvin Parks and Kenneth Miller washed the car and commenced the simonizing. The cleaning operation had not been completed at closing time, when Miller and Marvin Parks left for the day. The plaintiff's car was left inside the building. The keys were left in the ignition. There was a safe in the office portion of the premises, which could be locked. The keys of the car could have been put in the safe. However, it was the practice of Marvin Parks to leave the keys of cars which remained on the premises overnight in the ignition so that these cars could be moved more easily if a fire should occur.

So that at 6 o'clock we have the doors of the premises locked from the inside excepting the office door which could be opened from the outside by any one of the three keys. All employees had left for the day. Inside the premises was the plaintiff's car with the keys in the ignition.

Kenneth Miller commenced to work for the defendants in June of 1961. He was described by Marvin Parks as dependable and courteous and the best employee he had. On or about July of 1962, the defendant Marvin Parks hired Kenneth Miller as a janitor in addition to his other duties. This involved Miller coming back to work at about 7 o'clock in the morning and doing the janitorial work before the defendant Marvin Parks arrived to open the premises for business. Marvin Parks gave Miller a key to the office so that he could gain entrance to the premises and do the janitorial work.

The duties of Miller as a car washer, dryer and polisher and his duties as janitor, did not involve the driving of cars or trucks. On one occasion, about one month after he was hired, Miller had undertaken to drive a truck belonging to a customer. Marvin Parks ordered Miller from the truck and forbade him to drive any cars or trucks on the premises thereafter. Miller never violated these instructions until the night of November 7, 1962.

After Marvin Parks had closed for the night and before 9 o'clock of November 7th, Miller returned to the premises, entered the office by using his key and drove the plaintiff's automobile out and at about 9 o'clock in the evening, was involved in a serious accident which damaged the plaintiff's car

Evidence was given that the workers at the car wash were almost entirely transients and most of them worked for a few hours or a day or so and left. The evidence of Police Officer Pringle was that Miller was not capable of giving a statement concerning the accident after it happened. He said that Miller appeared to be mentally deficient. Counsel for the plaintiff sought to establish in cross-examination that Miller was a person of retarded mental development and that he was presently in hospital for mentally ill persons. I cannot accept this evidence as proof of the measure of Miller's mental capacity, nor for the purpose of proving the truth of the allegation of mental retardation or mental instability.

The evidence is clear that the defendant Marvin Parks made no investigation of or inquiries about Miller when he hired him or subsequently. He undertook to give him the key to the premises, to permit him to act as janitor, purely on a basis of his observations of him as a steady employee over a period of about 12 months.

On these facts, I find that Emily and William Parks carrying on business as Spee-Dee Auto Wash were bailees for pay of the plaintiff's automobile at all material times.

I also find that Marvin Parks and Kenneth Miller were employees of Spee-Dee Auto Wash.

The claim is made in the alternative. First, the plaintiff contends he has the right to damages against the defendants because of the breach of the implied contract of bailment. Since the evidence establishes that Marvin Parks was not a bailee but the servant of the Spee-Dee Auto Wash, the claim based on bailment cannot succeed against this defendant.

Secondly, the plaintiff contends that he has the right to damages because of acts of negligence of the defendants. The right to damages for negligence must rest upon a duty owed by a defendant to a plaintiff, which duty has not been carried out and that this failure to observe the duty has caused the damage claimed. It does not appear to me that the defendant Marvin Parks owed a duty to the plaintiff the breach of which has resulted in the plaintiff's damage. On this score, also I find that no claim has been made out against the defendant Marvin Parks. It, of course, does not follow that if the defendant Marvin Parks was negligent in the discharge of his duties as a servant of Spee-Dee Auto Wash that the defendants William and Emily Parks are relieved of the liability arising from that negligence.

The general law as it relates to bailment is discussed in 2 Hals., 3rd ed., pp. 96, 114-5, paras. 192, 225, 226:

> 192. Of the various rights and duties of bailors and bailees, that most discussed is the degree of care and diligence required of the bailee in each kind of bailment, and that degree has, from the time of the Roman Empire till now, been held to vary according to the benefits derived from the bailment by the bailor and the bailee respectively. An ordinary degree of care and skill usually is required where both benefit from the transaction; slighter diligence, perhaps, where the benefit is wholly that of the bailor . . . and greater diligence where the benefit accrues only to the bailee . . . It may perhaps be stated with equal truth and brevity that the bailee is required in every case to take that degree of care which may reasonably be looked for, having regard to all the circumstances; for example if you confide a casket of jewels to the custody of a yokel, you cannot expect him to take the same care of it that a banker would.
>
> 225. A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depositary, and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances.
>
> He is therefore bound to take reasonable care to see that the place in which the chattel is kept, including the tackle used in connexion with it, is fit and proper for the purpose, to see that the chattel is in proper custody, to protect it against unexpected danger should that arise, *to recover it if it is stolen*, and to safeguard the bailor's interest against adverse claims; and if it is injured through his negligence, he will not be excused on the ground that it has been subsequently destroyed by inevitable mischance . . . [Italics added.]

Page 116:

> *The obligation to take due care exists independently of contract and an action based on breach of the obligation is an action founded on tort.*
>
> *The bailee is not, apart from special contract, an insurer, and, therefore, in the absence of negligence on his part* he is not liable for loss or damage to the chattel due to some accident, fire, the acts of third parties, *or the unauthorised acts of his servants acting outside the scope of their employment.* [Italics added.]

[Page 117]:

> 226. *The custodian is further responsible to the owner of the chattel entrusted to him both for the negligence of his agents or servants, and for their acts of fraud or other wrongful acts, provided that such acts were committed by them within the apparent scope of their authority,* either in the supposed interest of their principal or master or in the course of their employment. And although usually speaking, such a custodian incurs no responsibility where an act of fraud or negligence is committed by a servant or agent not in the course of his employment or outside the scope of his authority, *he may be liable if he was negligent in engaging the servant whose act occasioned the loss.* [Italics added.]

Counsel for the plaintiff rested his argument to a large extent on the case of *Van Geel v. Warrington*, [1929] 1 D.L.R. 94, 63 O.L.R. 143. Counsel for the defendants argued that the more recent case of *Darling Ladies' Wear Ltd. v. Hickey*, [1949] 2 D.L.R. 420, [1949] O.R. 189, [1949] O.W.N. 180; [1950] 1 D.L.R. 720, [1949] O.W.N. 768, was in point. It was suggested that these two cases both decided by the Court of Appeal of Ontario, though by Courts differently constituted, were in apparent conflict.

It seems desirable therefore to consider these two cases and the earlier decisions which they purport to follow as well as subsequent decisions dealing with similar facts.

The facts of the *Van Geel* case are as follows:

The defendant was a service station operator and in the course of his business he supplied gas, oil and washed cars. His place of business was on Bay St. However, he had no facilities there for washing cars. It was his practice to have cars placed with him for washing transferred by his employees to a garage on King St.

The plaintiff was a customer of the defendant and he delivered his car to the Bay street premises to have the gas and oil replenished and a wash job done. The car was to remain overnight with the defendant. The plaintiff had made similar arrangements in respect of his automobile on other occasions. There was a dispute as to whether the plaintiff knew that the car would be washed at another location than the one where he had on this and other occasions left his car for similar service.

One of the defendant's employees was known as William Cara. Cara had worked for the defendant for about 6 months. His work at first was in minor capacities, later as a driver of the defendant's own car and one of the principals at the defendant's service station under the manager.

On the night the plaintiff left his car, this man Cara, after 9 p.m. was the senior man in charge. One of the duties of Cara was to take customers' cars from the Bay St. location to the King St. garage for washing.

At about 10:30 on the night the plaintiff left his car at the Bay St. service station, Cara acting in the course of his employment as a servant or agent of the defendant, removed the car from Bay St. with the purpose of delivering it to King St. On the way to the King St. garage, he picked up three girls and another man. The group obtained a bottle of liquor and drove to Brantford where the car collided with a telephone pole and was seriously damaged.

On these facts, the Court found the defendant liable for the damages. It is to be noted that Latchford, C.J., Riddell, Middleton, and Masten, JJ.A., all wrote opinions.

The Chief Justice sums up his reasoning on p. 97 D.L.R. as follows:

> Applying the reasoning of Rowlatt, J. [in *Williams v. Curzon Syndicate, Ltd.* (1919), 35 Times L.R. 295; 35 Times L.R. 475] to the present case, it was necessary that servants should be engaged by the defendant to transfer cars from the service station [Bay St.] to the Commonwealth garage [King St.]. Such servants should be honest and trustworthy, especially as great risk was run in placing them in charge of property of great value such as the plaintiff's car. Inquiry would have established the bad reputation of McDonald. An implied contract existed between [the plaintiff] and [the defendant] that the latter should use a large measure of care in the selection of such servants entrusted with articles of value.
>
> On this ground alone I think the plaintiff entitled to succeed.
>
> Other grounds may be inferred from the *ratio decidendi* in *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716.

Riddell, J.A., on the other hand at p. 100 says in part:

> The case of *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716, is to my mind conclusive here . . .
>
> While I base my opinion on the law as laid down for us by the House of Lords as above, I am not to be taken as holding that the plaintiff is not entitled to succeed on the ground of the negligence of the defendant in the entrusting of a valuable car to Cara without any inquiry as to his past, his reliability — all that was considered was his capacity as a workman. This, however, does not enter into my judgment.

Middleton, J.A., in his characteristic fashion sums up the basis of his judgment in a paragraph on pp. 100-1 when he says:

> I think that the ordinary principles of the law of master and servant and principal and agent apply to the case of a bailee. Such a bailee as the keeper of a garage is not an assurer of the cars entrusted to him. His obligation is to take the same care as reasonable men ordinarily use in their own affairs; and, had the car been taken from the defendant's care, notwithstanding the use of due diligence, by a stranger, the defendant would not have been liable.
>
> A master is liable for the conduct of his servant, the agent whom he selects and puts in his place to discharge the duty he has undertaken, and this law is applicable in the case of bailment. The conduct of the servant is then the conduct of the master, and the master is liable to the bailor.

However, at p. 101 His Lordship continues in part as follows:

> It is equally plain that a master cannot be made liable for all the wrongful acts of the servant upon the mere proof of the relationsbip.

His Lordship then goes on to point out the difficulties which arose as a result of attempts by the Courts to delineate the principles upon which the master would be exempt.

His Lordship at p. 103, after citing with approval *Central Motors (Glasgow), Ltd. v. Cessnock Garage & Motor Co.*, [1925] S.C. 796, points out that this case left open whether the misconduct of the defendant's servant could ever be a good defence to an action for breach of contract of *locatio operarum*:

> Following the example of the Scotch Court and its caution, I would leave open and in abeyance the question as to the possibility of any defence to an action by the bailor based upon misconduct of the servant.

Finally, at p. 104, Middleton, J.A., says:

> This [after reciting a portion of the judgment of Lord Cullen in the *Central* case] makes it quite unnecessary to consider the question of the liability of the present defendant upon the theory that he was negligent in the selection of this particular employee as one to whom valuable property of a third person should be entrusted. It is in my opinion a dangerous thing for a master to entrust cars worth many thousands of dollars to the care of one of whom he has little knowledge.

Masten, J.A., at pp. 105-6 says:

> Having had an opportunity of considering the judgment of my brother Middleton, in the conclusions and reason of which I fully concur, I desire to add only two observations.
>
> . . . I desire to limit my judgment to the facts of the present case, and, as in the Scotch case of *Central Motors (Glasgow) Ltd. v. Cessnock Garage & Motor Co.*, [1925] S.C. 796, to reserve the general question whether the misconduct of the bailee's servant can ever be a good defence to an action for a breach of a contract of *locatio operarum*.
>
> . . . While the defendant would not be responsible for a tort committed by Cara or McDonald while driving the stolen car, he did, notwithstanding the theft, remain civilly responsible as bailee for the act of the man whom he had employed to carry out the contract made by him with the plaintiff, *viz.*, safely to keep and redeliver the car to his bailor.

Orde, J.A., agreed with Middleton, J.A.

In result, therefore, three of the Judges concluded that the defendant as a bailee had entered into an implied contract with the plaintiff to use the same degree of care that reasonable men exercise in their own affairs to safely keep and redeliver the car to his customer, the plaintiff. If the defendant had driven the car to Brantford and damaged it as Cara or McDonald did, the defendant would have breached his implied contract and would be liable for the damage.

The evidence is clear that Cara was employed to drive cars and one of his customary tasks was to drive customers' cars from Bay St. to King St. He took charge of the car at Bay St. and apparently started for King St. While driving, he elected to depart from his master's instructions and engaged in activity which was totally different from the terms of the implied contract. In so doing, the car was damaged. The Court decided that the acts of Cara, the servant or agent, are in law the acts of the defendant.

Since the defendant would have been liable to the plaintiff if he had breached his agreement, he is vicariously liable because of the act of his agent.

None of these judgments are based upon negligence. Each reserve the question of liability of a bailee for negligence in selecting his employees. Their expressions of opinion are purely *obiter*.

The Chief Justice alone bases his judgment on breach of the implied contract which he states to be [p. 97] "that [the defendant] should use a large measure of care in the selection of such servants entrusted with articles of value".

I think one need go no further into the decided cases than *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716, to satisfy oneself as to the law. In that case the confusion which developed after *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259, and perpetuated in *British Mutual Banking Co. v. Charnwood Forest R. Co.* (1887), 18 Q.B.D. 714, and *Ruben et al. v. Great Fingall Consolidated*, [1906] A.C. 439, was clarified.

Willes, J., in the *Barwick* case had stated [p. 265]:

> The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.

Lord Macnaghten, in the *Lloyd v. Grace, Smith & Co.* case, had this to say at p. 732:

> To that statement of the law [as cited by Willes, J., above] no objection of any sort can be taken. But it is a very different proposition to say that the master is not answerable for the wrong of the servant or agent, committed in the course of service, if it be not committed for the master's benefit.

At p. 737 His Lordship cites the following [quoting *McGowan & Co. v. Dyer* (1873), L.R. 8 Q.B. 141 at p. 145]:

> "In Story on Agency, the learned author states, in s. 452, the general rule that the principal is liable to third persons in a civil suit 'for frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.' He then proceeds, in s. 456: 'But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit.' "

The English Court of Appeal in 1904 had dealt with a case the facts of which bear greater similarity to those of the case at bar. That case is *Sanderson v. Collins*, 90 L.T. 243. In that case the plaintiff, a coachbuilder to whom the defendant had sent a coach for repairs, lent the defendant a dogcart for his use while the repairs were being executed. Without the knowledge of the defendant, his coachman took the dogcart out for his own purposes and while he was driving the dogcart, it was damaged through his negligence. The Court of Appeal held that since the coachman at the time when the damage was done was not acting in the course of his employment or within the scope of his authority, the defendant was not responsible for his negligence.

In the course of this judgment, the Court examined and commented upon an earlier decision of the Divisional Court cited as *Coupé Co. v. Maddick*, [1891] 2 Q.B. 413. In that case the defendant, a surgeon, had hired a horse and carriage from the plaintiff. Returning home one afternoon, the defendant ordered his coachman to take the carriage to his stable close by but the coachman instead of doing so, drove to a place about a mile and a half away. While he was returning to his master's stable, the coachman, who was subsequently convicted of having been drunk at the time, met with an accident caused by his negligent driving and the horse and carriage suffered damage. The Divisional Court found for the plaintiff.

In commenting on this decision, the Court of Appeal in the *Sanderson v. Collins* case said that it would be supported on the view that the defendant's coachman, though he dis-

obeyed his master's orders, was nevertheless acting in the course of his employment at the time of the accident.

In 1914, the Supreme Court of Canada decided *Halparin v. Bulling* (1914), 20 D.L.R. 598, 50 S.C.R. 471, 8 W.W.R. 95. and based its decision upon *Storey v. Ashton* (1869), L.R. 4 Q.B. 476.

In 1925, *Central Motors (Glasgow), Ltd. v. Cessnock Garage & Motor Co.*, [1925] S.C. 796, was decided by the Scottish Court of Session (First Division). This case, though not binding on our Courts, is entitled to be treated with profound respect because of the fact that Scottish law in this regard appears like our own to trace its origin to the Roman law.

In that case, the plaintiff entrusted his car to the defendant for safe custody overnight. The night watchman in charge of the garage took it out for his own purposes during the night and while he was on duty as night watchman. In driving the car out of the garage, the watchman acted contrary to his employer's instructions and without their knowledge.

It was held that the defendant had delegated to their servant the duty of keeping the car safely secured in the garage and they were liable to the plaintiff for the failure of the servant's performance of that duty.

It seems to me that the reasoning of Middleton, J.A., in *Van Geel v. Warrington*, [1929] 1 D.L.R. 94, 63 O.L.R. 143, follows logically from these decisions. But the basis of decision in each case is based directly upon the servant "acting within his authority" or "acting in the course of his employment" or "acting within the scope of his agency". Whichever of these expressions is used, it must be interpreted liberally. In all cases of this nature, the master seldom authorizes the specific act but he has in each case, where liability has been found to attach, put the servant in his place to do the class of acts and he must be answerable for the manner in which the servant has conducted himself.

This brings us to the *Darling Ladies' Wear Ltd. v. Hickey* case [[1949] 2 D.L.R. 420, [1949] O.R. 189], decided by the Ontario Court of Appeal in 1949 in appeal from Genest, J. The report of both the trial Court and the Appeal Court must be read to secure the facts.

The plaintiff delivered its car to the defendant's garage operator for repairs. The car was to be left overnight and picked up by the plaintiff the following day. The garage was closed for the day. At about 9 o'clock in the evening, one Dainard, a mechanic employed by the defendant, returned to the garage. He entered with a key which had been given to him by the employer and drove the car away in pursuit of his own purposes. Dainard was involved in an accident at about 5 o'clock on the following morning and the car was wrecked.

Dainard was employed as a mechanic by the defendant and had been so employed for about a year before the night in question. As a trusted employee, he had been given a key. Following delivery of the plaintiff's car, Dainard had been instructed to do mechanical work to it.

The trial Judge applied *Van Geel v. Warrington* and concluded that the garage owner was liable. Laidlaw, J.A., delivering the judgment of the Court, reversed the trial Judge, finding that the *Van Geel* and *Central Motors* cases were clearly distinguishable. His Lordship emphasizes that Dainard went to the premises after hours and appropriated the car and, in reality, stole it. He was not in the premises on the defendant's business and his misconduct was not attributable to the defendant so as to make the latter liable in tort or in contract.

It seems to me that the *Van Geel* case and the *Darling* case are distinguishable if we apply the test of whether or not Dainard was acting within the scope of his authority. The distinction, I think, becomes apparent when we compare the facts in *Sanderson v. Collins*, the *Central Motors* case and the *Van Geel* case with the facts in the *Coupé* and *Darling* cases.

Geo. W. Paton in his book *Bailment in the Common Law* (1952), p. 182, makes this statement:

> There has been much confusion concerning the liability of a bailee for the acts of a servant. If a chauffeur, without authority and on a frolic of his own, takes out his master's car and negligently injures a pedestrian, the master is not liable as the servant is acting outside the course of employment. If the car is one bailed to the master, and the servant, again on a frolic of his own, takes out the car and damages it, the master is liable or not according to whether he entrusted that servant with the responsibility of custody. If the servant was not charged with the responsibility of keeping that car, the master is not liable if the servant takes it out in an unauthorised way; but if the responsibility has been entrusted to the servant, the very act of taking the car is a breach of the implied terms of the bailment.

It is to be noted that in 1949, R. W. Macaulay, in an article written in 27 Can. Bar Rev. 585, concurs in the view above-expressed, and attacks *Darling Ladies' Wear Ltd. v. Hickey* where this distinction seems to be ignored.

There cannot, therefore, in law be liability found against the defendants Emily and William Parks in respect of the acts of Miller. Miller clearly was a car washer and janitor and was not at any time charged or entrusted with any responsibility for keeping the plaintiff's car.

There remains the second branch of the case which seeks to establish liability of the defendants Emily and William Parks on the grounds of negligence. This branch in turn must be subdivided into two parts because the plaintiff claims the right to be indemnified by reason of the negligence of Marvin Parks in that he left the keys in the ignition of the plaintiff's car when these could or should have been removed when the premises were closed for the night.

The second subdivision of the alleged negligence is the assessment of the conduct of the servant, Marvin Parks, in hiring Miller as a janitor without an investigation of his reputation and entrusting him with a key to the premises.

The evidence in respect of the first allegation is that at one time Marvin Parks was accustomed to remove the ignition keys of cars left in the premises overnight. However, a customer had requested that in so far as his motor vehicles were concerned, he wished the car keys left in the ignition when his vehicles were left in the defendants' premises overnight. Marvin Parks deposes that thereafter he left the keys in all vehicles left in the premises overnight. His reason for doing so was to facilitate the vehicles being moved in the event of fire. It is not disputed that there was a safe in the office portion of the building which could be locked. It is, therefore, clear that if the keys to the plaintiff's car had been removed and placed in the locked safe, Miller would have required to break into the safe to secure possession of them. I suppose it is reasonable to take into account the fact that Marvin Parks might have taken the ignition keys with him at closing time.

The question is whether or not Marvin Parks was guilty of a breach of the duty which William and Emily Parks owed to the plaintiff in failing to remove the ignition key and that that breach caused the damage to the plaintiff's car. The test to be applied is whether the conduct of Marvin Parks measures up to that of a reasonable man. It may be that there is a difficulty in divorcing this consideration from the question of negligence arising in the hiring of Miller. But in my view, and considered by itself, I cannot find that Marvin Parks acted unreasonably in leaving the ignition keys in the car. I am influenced in this view by a consider-

ation of the possibility of fire which, in the mind of a reasonable man, is no more nor less probable than a breaking into the premises by a thief.

In my view, the conduct of Marvin Parks was that of a reasonable man. He had secured and locked the premises before leaving at night. He was not obligated to anticipate that unauthorized entry of the premises would be made during the night. The obligation of his employers was not that of insurers. It is true that the leaving of the keys in the car made it easier for Miller to take the car but I am bound to take judicial notice of the fact that in our time many schoolboys know how to start an internal combustion engine without benefit of ignition keys.

There is no basis in my view for the plaintiff's claim to succeed on this allegation of negligence. The leaving of the keys in the ignition was not the direct cause of the plaintiff's damage.

There remains for consideration the claim based upon negligence in the hiring of Miller. It is alleged that the defendants Emily and William Parks are liable because of the negligence of their employee, Marvin Parks, in hiring Miller as a janitor, a position which necessitated his having a key to the premises, without first making an investigation of Miller's background. There is no need to discuss the question of the liability of William and Emily Parks for the negligent acts of Marvin Parks. Marvin Parks had been delegated to manage the business. If it has been shown that Marvin Parks was guilty of a breach of duty to the plaintiff in failing to exercise due care in hiring Miller and that this breach of duty by Marvin Parks caused or contributed to the damage claimed to the plaintiff's car, then the defendants William and Emily are liable.

In *Paton on Bailment* at p. 181 the learned author says: "The bailee may be liable for theft of the *res* by a servant, if he was guilty of negligence in choosing that servant."

He cites as authority *Williams v. Curzon Syndicate (Limited)* (1919), 35 T.L.R. 475. This, of course, is the case upon which the judgment of Latchford, C.J., is based in the *Van Geel* case [[1929] 1 D.L.R. 94, 63 O.L.R. 143] and, as nearly as I can ascertain, is the leading case. The facts relevant to this inquiry may be summarized.

The plaintiff was a member of a residential club of which the defendants were proprietors. The plaintiff gave to the defendants' manager certain jewellery to lock up in a safe in the manager's office. The jewellery was stolen from the safe by the night porter employed by the defendants. The defendants had obtained references from two previous employers but apparently had made no inquiry as to his previous career. After the theft, it was discovered that he was an old and dangerous criminal. The Court of Appeal found that there was negligence in employing the night porter and that that negligence was the direct cause of the plaintiff's loss.

I regret that the report of *Central Motors v. Cessnock* is not available. The synopsis of this case and the comments on it indicate that, while the judgment was given upon other grounds, the matter of negligence in engaging employees entrusted with responsibility for the care or custody of chattels could render a bailee liable.

The judgment of Latchford, C.J., is based entirely on an implied contract between the plaintiff and defendant that the defendant would exercise a large measure of care in the selection of (such) servants entrusted with articles of value and that inquiry by the defendant would have established the bad reputation of McDonald, the servant.

The judgment of Riddell, J.A., at p. 100 expressly leaves open the question of the defendant's liability on this ground, as does the judgment of Middleton, J.A., at p. 103 and again at p. 104. Masten, J.A., at p. 106 by way of *obiter* excludes this ground from his reasons for finding the defendant liable. Since Orde, J.A., concurred with Middleton, J.A., it follows that the view of the Chief Justice was a minority one.

However, because of the force of the *Williams v. Curzon* case, and because of the high regard in which the views of Latchford, C.J., were held, let us assume that these cases correctly set forth the law of Ontario. Do the facts here support a finding of liability on the part of the defendants William and Emily Parks?

The evidence discloses that all of the employees, or nearly all, at the car wash were transients. The seasonal nature of the work, the method of paying employees and the fact that no skills were necessary attracted unskilled labourers. Some of these men worked only a matter of hours or at most days. Miller on the other hand had stayed on for nearly a year and a half. Then he frequently did work for which he was not paid, such as simonizing cars. By comparison with the other employees, he was regarded as steady and dependable. Only once during his period of employment did he violate his orders not to drive cars. This offence occurred early in his employment. No inquiries were made about his previous employment. No inquiries were made of his school or teachers there. Miller was placed in possession of a key to the premises after one year and for about 6 months, he appeared to justify the defendants' confidence. It was then wholly as a result of the observations of Miller as a car washer and polisher that he was entrusted with the key and as a result of these observations and others made in his new capacity as janitor that he was entrusted to enter the premises alone each day and thereby to have access to automobiles or trucks remaining on the premises overnight.

Miller was not of course hired as a night watchman or night porter, as in the *Williams* case, and he was not employed to drive cars, as was Cara in the *Van Geel* case. In fact, he was forbidden to do so.

At this point it is important to note one point of difference between the instant case and those cited, which to me seems conclusive. In both the *Williams* case and the *Van Geel* case, evidence was adduced at the trial to prove that if an investigation had been made by the defendants, they would have secured information which would show that both men were of bad character. There is nothing in the evidence before me that would, if an investigation had been made by Marvin Parks, have disclosed any propensity to steal or shortcomings of character which would have put him on guard against giving Miller a key.

I think it must be inferred from the evidence of Marvin Parks that Miller had a low intelligence quotient. The fact that Miller continued to work at the poor paying job with uncertain wages for a period of a year and a half would confirm his low mentality. Inquiry at his school, even of his parents, might have revealed other information. However, there is no proof that a full and complete inquiry would have disclosed valid reason for failing to trust Miller to do the jobs he was hired to do. Limited mental capacity is by no means proof of dishonesty or a lack of trustworthy character unless the mental limitation goes much farther than has been established here.

Accordingly, I find that this action should be dismissed with costs to the defendants Emily and William Parks.

The action is also dismissed against Marvin Parks for the reasons given but without costs.

Action dismissed.

Compare MORRIS v. C.W. MARTIN, [1965] 3 W.L.R. 276 (C.A.)

PETTERSSON v. ROYAL OAK HOTEL, LIMITED. Court of Appeal for New Zealand. [1948] N.Z.L.R. 136.

The plaintiff was in the bar of the Royal Oak Hotel when an elderly customer who was refused a drink by the barman, named Price, resenting the refusal, threw an empty glass at or towards the barman. Price reached down, picked up a portion of the broken glass, threw it at and struck the resentful customer. A fragment or splinter of the glass became detached from the main piece as it was thrown and entered the right eye of the plaintiff who was standing nearby.

There was evidence that contemporaneously with the throwing Price said to the offending customer: "Get to hell out of this", and immediately after said: "No one can throw a glass at me and get away with it."

At the trial only the question of damages was left to the jury, the parties agreeing that the trial judge dispose of all other issues. Fair J. held that the defendant hotel was liable, stating in part: "It was established by the evidence that the piece of glass was thrown by the barman, not in order to expedite the departure of the troublesome customer, but as an expression of his personal resentment at the glass having been thrown at him.

In these circumstances, it was argued on behalf of the defendant that it is not responsible for the injuries which the plaintiff suffered as a result of the barman's act. It was argued that, as the barman did not throw the piece of glass to ensure that the customer left the bar, but owing to his personal resentment and anger against the customer, the defendant is not liable. It is suggested that the principle is established in various cases which were cited to the Court..

In the present case, the barman was engaged on his ordinary employment in seeing to the sale of liquor, and, incidentally, refusing to serve an unsuitable customer. As a result of that, he suffered considerable provocation. But he was still on duty in the bar. The plaintiff was one of the other customers, and, in the course of his duty to the other customers, the barman was bound, as part of his employment, to do nothing that was likely to endanger them, and, where necessary to ensure that, to keep control of his own temper, and of his private resentment. If he neglects to perform this duty while so employed, he is negligent in the course of his employment as clearly as the carpenter was in William v. Jones (1865) 3 H. & C. 602. The negligent act there was one of negative negligence. The negligence in the present case was positive, or active negligence. But this difference in the kind of negligence provides no ground for distinction. The plaintiff was just as much entitled to require that the barman in the course of carrying out his duties should not endanger him as the owner of the shed in William v. Jones was entitled to demand that the carpenter should not by his negligence destroy his shed. Moreover, the cause of his negligent act arose directly out of, and was directly connected with, the performance of his duties, and might well be regarded as a natural, though foolish and negligent, consequence of them.

There was here no independent act by the barman not directly connected with the conditions and circumstances of his employment such as would cause the case to fall within the cases referred to by the Court in Limpus's case."

The defendant appealed.

Cleary, for the appellant. . . The barman's act was not a negligent method of carrying out his ordinary duties (as stated, in effect, by the learned trial Judge). In so far as that statement is a finding of fact, it is not justified; and it is onconsistent with previous findings that the barman's act was not done in the execution of his duty. Once that is said, it cannot at the same time be a negligent method of performing his duty. The learned Judge's statement that the barman was bound to do nothing to endanger customers is not disputed. But then it is said that a breach of his duty is negligence in the course of his employment. If that were correct, then the vicarious liability of the employer would be co-extensive with the personal liability of the servant for his tortious acts. If it be a suggestion that there are no special considerations relating to the wilful acts of a servant, it is not in accordance with authority, as it would suggest that there is notdistinction between a servant's wilful wrong-doing and his negligence in the course of his employment.

O. C. Mazengarb, for the respondent. A. On the facts, the injury to the respondent arose out of and in the course of the barman's employment, and the judgment on those facts is conclusive against the appellant.

B. Where an innocent person is injured by an employee, the loss falls on the party who clothed him with the authority by which he was enabled to do the act which caused the damage.

C. The broad principle is that the master is liable for those acts of his servant which are directly connected with the work he is doing for the master; and it should not be whittled away by fine distinctions, such as the purpose or motive of the act or the respective duties of barman, head barman, or bar-manager.

D. The respondent being an invitee, the licensee of the hotel owed him a duty not to allow anything to be done by a servant which might result in harm to him.

O'LEARY C.J. . . . It was within the scope of Price's employment to keep order in the bar and to prevent altercations. and it was his duty to do that work with due and proper care so as to prevent injury or damage being occasioned to others. Quite apart from the question whether the throwing of the glass was an expression of Price's personal resentment at the glass having been thrown at him (and this matter I will deal with later), it is clear that, whatever his motive was, to throw the glass was not performing his work of keeping order, and preventing injury or damage, with the due and proper care which was demanded. It might be said that, as the customer was going out, no further action on the part of the barman was necessary, and, therefore, the act which caused the damage was

independent of, and not connected with, the employment. It is still the fact, however, that he performed the work of keeping order in a manner which was negligent, and, indeed, improper, and, instead of reducing the possibility of disorder, he contributed to it. It cannot be said, therefore, that what he did was an independent act unconnected with his employment; it was a personal act, but it was at the same time an improper mode of doing his work.

Apart from the application of the principles which I have cited from Salmond, I think the position is precisely covered by the statement of Lord Wright in Century Insurance Co, Ltd, v. Northern Ireland Road Transport Board, [1942] A.C. 509 and quoted by the trial Judge as follows: "The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either arguments or authority. I think what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette in abstraction from the circumstances as a separate act. This was the line taken by the majority judgment in Williams v. Jones, but Mellor and Blackburn JJ. dissented, rightly as I think."

Mr. Cleary strongly argued that, as it had been found that the throwing of the glass was an expression of the barman's resentment, and not in order to expedite the departure of the troublesome customer, it was an independent act for which the employer was not liable. I am not disposed wholly to accept this finding. I think it might well be the case that there was a double purpose, an expression of resentment and a desire to hurry the customer out. This would seem to be justified by the fact that the use of the words "Get to hell out of this" were used almost contemporaneously with the throwing, whilst the words "No one can throw a glass at me and get away with it" must have been used immediately afterwards. But, assuming it was resentment and nothing else, I still think liability exists. In the Century case, the smoking and lighting of the cigarette was for the servant's own pleasure, yet the master was liable because the servant's act was a wrongful mode of doing his work. In the present case, even if it was because of resentment alone, the throwing of the glass was nevertheless a wrongful mode of keeping order, and liability is imposed on the employer.

I think the appeal should be dismissed.

Appeal dismissed.

[The opinions of Smith and Callan JJ. are omitted, Cornish J. concurred.]

[In Deatons Proprietary Ltd. v. Flew (1949), 79 C.L.R. 370, a barmaid employed at a hotel threw the beer and then the containing glass in the face of the plaintiff. Plaintiff's evidence showed he had merely asked a polite question of the barmaid; the barmaid's evidence indicated that plaintiff was intoxicated, that he struck her and made an insulting remark and that she in anger and resentment threw the beer and glass. The High Court of Australia refused to hold her employer liable. Throwing the beer was not a means of keeping order nor incidental to any work the barmaid was employed to do. Even if done in self-defence, which was not apparent, it is difficult to say that an employer authorizes his servant to defend herself against violence nor, per Dixon J., was this act one of those acts "done for the servant's own benefit for which the master is liable when they are acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority the servant is held out as possessing or of the position in which he is placed as a representative of his master", citing Lloyd v. Grace, Smith & Co. It was simply an act of resentment done neither in furtherance of the master's interests nor as an incident to anything the barmaid was employed to do.

In Jennings v. C.N.R., [1925] 2 D.L.R. 630 (C.A.B.C.), a conductor of the railway, in collecting tickets, punched a negro passenger in the face. The trial judge dismissed the action because "it was a wanton assault for the purpose of wreaking a private spite." On appeal this was reversed and the company held responsible, presumably because "the collection of the ticket and the assault were in effect simultaneous acts" and so incapable of severance. But two of the judges relied on C.P.R. v. Blain (1903), 34 Can.S.C.R. 74. In that case "the company was held liable because it failed after notice to protect one of its passengers from certain assaults of a drunken fellow passenger, and I am of opinion that its duty is just as high to protect them from assaults by its own drunken or partially drunken conductor (i.e. agent), perpetrated in the course of his employment. and to whose care it has committed them upon their journey in its conveyances from which passengers have, temporarily, no means of escape to avoid injury at the hands of those in charge of them."--per Martin J.A. at p. 634. And see McPhillips J.A. to the same effect at p. 636; "Here the assault was the assault of the conductor. In the Blain case it was the assault of a third person, and in this connection Moss, C.J.O. said: 'If the conductor had been present when the assaults were committed, and took no steps to protect the plaintiff or to prevent their recurrence, it could scarcely have been argued that the defendants would not be liable.' A fortiori there must be liability when the conductor himself is the aggressor, especially when he is at the moment of the assault engaged in collecting the ticket of the passenger." See also Goddard v. Grand Trunk Ry. Co., (1869), 57 Maine 202; Croker v. Chicago & N.W. Ry. Co., 36 Wis. 657. In the latter a conductor of a train kissed a female passenger against her will and involved the company in liability. See an excellent note on "The Growth of Vicarious Liability for Wilful Torts Beyond the Scope of the Employment" (1931), 45 Harv. L. Rev. 342.]

BUSHEY v. UNITED STATES, 398 F.2d. 167 (1968)

FRIENDLY, Circuit Judge:

While the United States Coast Guard vessel Tamaroa was being overhauled in a floating drydock located in Brooklyn's Gowanus Canal, a seaman returning from shore leave late at night, in the condition for which seamen are famed, turned some wheels on the drydock wall. He thus opened valves that controlled the flooding of the tanks on one side of the drydock. Soon the ship listed, slid off the blocks and fell against the wall. Parts of the drydock sank, and the ship partially did—fortunately without loss of life or personal injury. The drydock owner sought and was granted compensation by the District Court for the Eastern District of New York in an amount to be determined, 276 F.Supp. 518; the United States appeals.[1]

Before reaching the merits, we must deal with a procedural issue injected by the district judge, since we would have no jurisdiction of the appeal if his decision of the question was correct. Although Bushey, the drydock owner, had brought its libel under the Public Vessels Act, 46 U.S.C. §§ 781–790, and the United States did not dispute the applicability of that statute save for unsuccessfully contending that Bushey must first present its claim to the Coast Guard Board of Contract Appeals,[2] the judge ruled that the damage to the drydock was not "caused by a public vessel of the United States" since "the Tamaroa was not, in a practical sense, a ship causing a 'collision,' but an inert mass." 276 F.Supp. at 523. He then proceeded to hold (1) that sovereign immunity was nevertheless waived under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2674, the exception in § 2680(d) for "any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States" being inapplicable because, as he believed, no such remedy was provided; (2) that Bushey's pleading would be deemed amended to allege a claim under the Tort Claims Act which it had not asserted; (3) that New York law applied, 28 U.S.C. § 1346(b); (4) that this, however, was the "whole" law of New York and (5) that New York would, indeed must, determine liability for a tort on navigable waters in accordance with maritime law. Hence, from a substantive standpoint, the chase was thought to have ended where it began, save for a caveat as to the applicability of distinctive admiralty remedies, notably limitation, an issue not practically important here.

[1, 2] What does remain important is that our powers to review a judgment determining liability but not fixing damages are entirely different if the action was in admiralty as the parties thought or at law as the judge held. If it was the former, we have jurisdiction under 28 U.S.C. § 1292(a) (3) relating to "interlocutory decrees * * * determining the rights and liability of the parties to admiralty cases in which appeals from final decrees are allowed," whereas if it were the latter, we would have none. Beebe v. Russell, 60 U.S. (19 How.) 283, 285, 15 L.Ed. 668 (1856); Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945).

[3, 4] We perceive no basis for the court's restrictive reading of the Public Vessels Act. It is no strain whatever on the language to say that a public vessel has "caused" any tort damage for which she is legally responsible. Thomason v. United States, 184 F.2d 105 (9 Cir. 1950). The Act speaks of causing "damage"; it says nothing about causing "collision." Such debate as there has been concerning the scope of the Public Vessels Act relates to claims sounding in contract, see Calmar S. S. Corp. v. United States, 345 U.S. 446, 456 n. 8, 73 S.Ct. 733, 738, 97 L.Ed. 1140 (1953), and even as to that "equivocal language should be construed so as to secure the most harmonious results." Id. Furthermore, and decisively, even if the judge's narrow reading of § 1 of the Public Vessels Act had been warranted, the suit could nevertheless be maintained under § 2 of the Suits in Admiralty Act as amended, 46 U.S.C. § 742. This provides, *inter alia*, that in cases where if any vessel owned by the United States "were privately owned or possessed, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against

the United States * * *."— the language of the 1920 statute restricting the Suits in Admiralty Act to merchant vessels having been stricken in 1960, 74 Stat. 912, for the very purpose of avoiding fruitless jurisdictional controversies and bringing all maritime claims against United States vessels into the admiralty jurisdiction of the district courts. See S.Rep. 1894, 86th Cong. 2d Sess., 2 U.S. Code Cong. & Adm. News, p. 3583 et seq.[3]

With our appellate jurisdiction under 28 U.S.C. § 1292 (a) (3) thus established, we return to the facts. The Tamaroa had gone into drydock on February 28, 1963; her keel rested on blocks permitting her drive shaft to be removed and repairs to be made to her hull. The contract between the Government and Bushey provided in part:

> (o) The work shall, whenever practical, be performed in such manner as not to interfere with the berthing and messing of personnel attached to the vessel undergoing repair, and provision shall be made so that personnel assigned shall have access to the vessel at all times, it being understood that such personnel will not interfere with the work or the contractor's workmen.

Access from shore to ship was provided by a route past the security guard at the gate, through the yard, up a ladder to the top of one drydock wall and along the wall to a gangway leading to the fantail deck, where men returning from leave reported at a quartermaster's shack.

Seaman Lane, whose prior record was unblemished, returned from shore leave a little after midnight on March 14. He had been drinking heavily; the quartermaster made mental note that he was "loose." For reasons not apparent to us or very likely to Lane,[4] he took it into his head, while progressing along the gangway wall, to turn each of three large wheels some twenty times; unhappily, as previously stated, these wheels controlled the water intake valves. After boarding ship at 12:11 A.M., Lane mumbled to an off-duty seaman that he had "turned some valves" and also muttered something about "valves" to another who was standing the engineering watch. Neither did anything; apparently Lane's condition was not such as to encourage proximity. At 12:20 A.M. a crew member discovered water coming into the drydock. By 12:30 A.M. the ship began to list, the alarm was sounded and the crew were ordered ashore. Ten minutes later the vessel and dock were listing over 20 degrees; in another ten minutes the ship slid off the blocks and fell against the drydock wall.

The Government attacks imposition of liability on the ground that Lane's acts were not within the scope of his employment. It relies heavily on § 228(1) of the Restatement of Agency 2d which says that "conduct of a servant is within the scope of employment if, but only if: * * * (c) it is actuated, at least in part by a purpose to serve the master." Courts have gone to considerable lengths to find such a purpose, as witness a well-known opinion in which Judge Learned Hand concluded that a drunken boatswain who routed the plaintiff out of his bunk with a blow, saying "Get up, you big son of a bitch, and turn to," and then continued to fight, might have thought he was acting in the interest of the ship. Nelson v. American-West African Line, 86 F.2d 730 (2 Cir. 1936), cert. denied, 300 U.S. 665, 57 S.Ct. 509, 81 L.Ed. 873 (1937). It would be going too far to find such a purpose here; while Lane's return to the Tamaroa was to serve his employer, no one has suggested how he could have thought turning the wheels to be, even if—which is by no means clear—he was unaware of the consequences.

In light of the highly artificial way in which the motive test has been applied, the district judge believed himself obliged to test the doctrine's continuing vitality by referring to the larger purposes *respondeat superior* is supposed to serve. He concluded that the old formulation failed this test. We do not find his analysis so compelling, however, as to constitute a sufficient basis in itself for discarding the old doctrine. It is not at all clear, as the court below suggested, that expansion of liability in the manner here suggested will lead to a more efficient allocation of resources. As the most astute exponent of this theory has emphasized, a more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps should be taken to prevent a recurrence of the accident. Calabresi, The Decision for Accidents: An Approach to Non-fault Allocation of Costs, 78 Harv.L.Rev. 713, 725–34 (1965). And the suggestion that imposition of liability here will lead to more intensive screening of employees rests on highly questionable premises, see Comment, Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees, 70 Yale L.J. 1296, 1301–04 (1961).[5] The unsatisfactory quality of the allocation of resource rationale is especially strik-

ing on the facts of this case. It could well be that application of the traditional rule might induce drydock owners, prodded by their insurance companies, to install locks on their valves to avoid similar incidents in the future,[6] while placing the burden on shipowners is much less likely to lead to accident prevention.[7] It is true, of course, that in many cases the plaintiff will not be in a position to insure, and so expansion of liability will, at the very least, serve *respondeat superior*'s loss spreading function. See Smith, Frolic and Detour, 23 Colum.L.Rev. 444, 456 (1923). But the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility, see Blum & Kalven, Public Law Perspectives on a Private Law Problem (1965), and this overarching principle must be taken into account in deciding whether to expand the reach of *respondeat superior*.

[5] A policy analysis thus is not sufficient to justify this proposed expansion of vicarious liability. This is not surprising since *respondeat superior*, even within its traditional limits, rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. It is in this light that the inadequacy of the motive test becomes apparent. Whatever may have been the case in the past, a doctrine that would create such drastically different consequences for the actions of the drunken boatswain in *Nelson* and those of the drunken seaman here reflects a wholly unrealistic attitude toward the risks characteristically attendant upon the operation of a ship. We concur in the statement of Mr. Justice Rutledge in a case involving violence injuring a fellow-worker, in this instance in the context of workmen's compensation:

> "Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. * * * These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment."

Hartford Accident & Indemnity Co. v. Cardillo, 72 App.D.C. 52, 112 F.2d 11, 15, cert. denied, 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415 (1940); cf. Robinson v. Bradshaw, 92 U.S.App.D.C. 216, 206 F.2d 435 (1953). Judge Cardozo reached a similar conclusion in Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522 (1920). Further supporting our decision is the persuasive opinion of Justice Traynor in Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5 (1946) [employer liable for violent acts of servant against employee of a subcontractor working on the same construction job], followed in Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684, 172 A.L.R. 525 (1947) [employer liable for violent acts of driver against another driver in traffic dispute].

[6–8] Put another way, Lane's conduct was not so "unforeseeable" as to make it unfair to charge the Government with responsibility. We agree with a leading treatise that "what is reasonably foreseeable in this context [of *respondeat superior*] * * * is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence * *. The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long-run activity in spite of all reasonable precautions on his own part. The proper test here bears far more resemblance to that which limits liability for workmen's compensation than to the test for negligence. The employer should be held to expect risks, to the public also, which arise 'out of and in the course of' his employment of labor." 2 Harper & James, The Law of Torts 1377–78 (1956). See also Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 544 (1961). Here it was foreseeable that crew members crossing the drydock might do damage, negligently or even intentionally, such as

pushing a Bushey employee or kicking property into the water. Moreover, the proclivity of seamen to find solace for solitude by copious resort to the bottle while ashore has been noted in opinions too numerous to warrant citation. Once all this is granted, it is immaterial that Lane's precise action was not to be foreseen. Compare, for a similar problem in the law of damages, Petition of Kinsman Transit Co., 338 F.2d 708, 721–726 (2 Cir. 1964), cert. denied, Continental Grain Co. v. City of Buffalo, 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed.2d 963 (1965), but see also 388 F.2d 821 (2 Cir. 1968). Consequently, we can no longer accept our past decisions that have refused to move beyond the *Nelson* rule, Brailas v. Shepard S.S. Co., 152 F.2d 849 (2d Cir. 1945), cert. denied, 327 U.S. 807, 66 S.Ct. 970, 90 L.Ed. 1032 (1946); Kable v. United States, 169 F.2d 90, 92 (2 Cir. 1948),[8] since they do not accord with modern understanding as to when it is fair for an enterprise to disclaim the actions of its employees.

[9] One can readily think of cases that fall on the other side of the line. If Lane had set fire to the bar where he had been imbibing or had caused an accident on the street while returning to the drydock, the Government would not be liable; the activities of the "enterprise" do not reach into areas where the servant does not create risks different from those attendant on the activities of the community in general. Cf. Gordon v. United States, 180 F.Supp. 591 (Ct.Cl.1960); Trost v. American Hawaiian S.S. Co., 324 F.2d 225 (2 Cir. 1963), cert. denied, 376 U.S. 963, 84 S.Ct. 1125, 11 L.Ed.2d 981 (1964). We agree with the district judge that if the seaman "upon returning to the drydock, recognized the Bushey security guard as his wife's lover and shot him," 276 F.Supp. at 530, vicarious liability would not follow; the incident would have related to the seaman's domestic life, not to his seafaring activity, cf. Hartford Accident & Indemnity Co. v. Cardillo, supra, 112 F.2d at 17, and it would have been the most unlikely happenstance that the confrontation with the paramour occurred on a drydock rather than at the traditional spot. Here Lane had come within the closed-off area where his ship lay, cf. McConville v. United States, 197 F.2d 680 (2 Cir. 1957), to occupy a berth to which the Government insisted he have access, cf. Restatement, Agency 2d, § 267, and while his act is not readily explicable, at least it was not shown to be due entirely to facets of his personal life. The risk that seamen going and coming from the Tamaroa might cause damage to the dry-

dock is enough to make it fair that the enterprise bear the loss. It is not a fatal objection that the rule we lay down lacks sharp contours; in the end, as Judge Andrews said in a related context, "it is all a question [of expediency,] * * * of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 354–355, 162 N. E. 99, 104, 59 A.L.R. 1253 (1928) (dissenting opinion).

Since we hold the Government responsible for the damage resulting from Lane's turning the wheels, we find it unnecessary to consider Bushey's further arguments that liability would attach in any event because of later inaction of Lane and others on the Tamaroa; and that in libels *in rem*, whose principles are here applicable by virtue of § 3 of the Suits in Admiralty Act, ordinary rules of agency are inapplicable and the ship is liable for anything ship-connected persons cause it to do. Cf. The China, 74 U.S. (7 Wall.) 53, 19 L.Ed. 67 (1868); Burns Bros. v. Central R.R. of N. J., 202 F.2d 910, 914 (2 Cir. 1953).

Affirmed.

1. The district court also dismissed a libel by the United States against the drydock owner for damage to the vessel; the United States has not appealed from that ruling.

2. This contention has not been pressed on appeal.

3. The discussion in Gilmore & Black, Admiralty, § 11–11 (1957), which the judge cited, 276 F.Supp. at 523, is thus largely obsolete—a good instance of the compelling need for a revised edition of this indispensable work.

4. Lane disappeared after completing the sentence imposed by a courtmartial and being discharged from the Coast Guard.

5. We are not here speaking of cases in which the enterprise has negligently hired an employee whose undesirable propensities are known or should have been. See Koehler v. Presque-Isle Transp. Co., 141 F.2d 490 (2 Cir.), cert. denied, 322 U.S. 764, 64 S.Ct. 1288, 88 L.Ed. 1591 (1943).

6. The record reveals that most modern drydocks have automatic locks to guard against unauthorized use of valves.

7. Although it is theoretically possible that shipowners would demand that drydock owners take appropriate action, see Coase, The Problem of Social Cost, 3 J.L. & Economics 1 (1960), this would seem unlikely to occur in real life.

8. The *Brailas* decision relied on Davis v. Green, 260 U.S. 349, 43 S.Ct. 123, 67 L.Ed. 299 (1922), which was applied in St. Louis-San Francisco R. Co. v. Mills, 271 U.S. 344, 46 S.Ct. 520, 70 L.Ed. 979 (1926); Atlantic Coast Line R. Co. v. Southwell, 275 U.S. 64, 48 S.Ct. 25, 72 L.Ed. 157 (1927); and Atlanta & Charlotte Air Line R. Co. v. Green, 279 U.S. 821, 49 S.Ct. 350, 73 L.Ed. 976 (1929). However, we agree with Chief Judge Murrah that the Supreme Court would not follow *Davis* today, despite its author's eminence. Copeland v. St. Louis-San Francisco R. Co., 291 F.2d 119, 121, 123 (10 Cir. 1961) (dissenting opinion).

Chapter III: Indemnity

LISTER v. ROMFORD ICE AND COLD STORAGE CO. LTD. House of Lords. [1957] A.C. 555; [1957] 1 All E.R. 125.

The appellant was, in January, 1949, in the employment of the respondent company as a lorry driver. He was then some 27 years of age and had, apart from an interval during the war, been in that employment since he was 17. He had previously for a short time been employed by them as a general labourer. On January 28, 1949, accompanied as mate by his father, he drove his lorry into a slaughterhouse yard off the old Church Road, Romford, to collect some waste. In the yard he backed his lorry and, in doing so, knocked down and injured Lister senior, who had previously alighted from it.

In June, 1951, Lister senior issued a writ against the respondents claiming damages for the personal injuries suffered by him, alleging that they were due to the negligent driving of the appellant and that the respondents as his employers were vicariously liable. This action was tried by McNair J. on January 29, 1953, and he held that the appellant had negligently driven the lorry in reverse without looking where he was going but that Lister senior was also at fault in failing to take proper care for his own safety, the relative responsibility being two-thirds for the appellant and one-third for Lister senior. The responsibility of the respondents was purely vicarious. The damage was assessed at £2,400 and judgment was entered for Lister senior for £1,600, two-thirds of that amount, and costs.

On January 26, 1953, three days before the trial of Lister senior's action, the respondents issued the writ in the action, in which this appeal is brought, claiming against the appellant "damages or in the alternative. . . payment by way of indemnity or contribution in respect of such damages as may be adjudged or agreed to be paid" to Lister senior in the first action and the respondents' costs of that action.

The proceedings were in fact brought in the name of the respondents, by an insurance company which ultimately paid the third party, under alleged rights of subrogation.

Ormerod J. gave the respondents judgment for 1,600 l. together with the costs paid by respondents to Lister senior and two thirds of their own costs incurred in defending the action brought by Lister senior. The Court of Appeal (Birkett and Romer L.JJ., Denning L.J. dissenting) dismissed an appeal by the present appellant: [1956] 2 Q.B. 180; [1955] 3 All E.R. 460. The present appeal to the House of Lords was then taken.

VISCOUNT SIMONDS . . . [The respondents in their statement of claim] alleged that they had paid the damages of £1,600 and were liable to pay the costs and that they had suffered loss and damage to the extent of such damages and costs by reason of the appellant's negligence. They pleaded further or alternatively that it was an implied term of the

contract of service of the appellant that he would carry out his duties with reasonable care and skill and that he had failed to do so whereby they had suffered loss and damage. They claimed an order that they might be indemnified by the appellant in respect of the sums they had paid to Lister senior and their costs of defending the first action, and alternatively "damages for negligence and/or breach of contract." I understand the first head of claim to be for a contribution of 100 per cent., that is, in effect, an indemnity under the Law Reform (Married Women and Tortfeasors) Act, 1935, which I will call "the 1935 Act", and the second head of claim to be founded alternatively on tort or the breach of a contractual duty of care....

... [The appellant] pleaded that it was an implied term of the contract of service that the respondents would indemnify the appellant against all claims or proceedings brought against him for any act done by him in the course of his employment, and, in the alternative, that it was an implied term that he would receive the benefit of any contract of insurance effected by the respondents and covering their liability in respect of the first action, that the respondents had in fact effected such insurance and that he claimed the benefit thereof. And it was further pleaded that there was no such implied term of service as the respondents alleged, that he would carry out his duties with reasonable care and skill, but that on the contrary the respondents by engaging him to drive a lorry on their behalf impliedly accepted him with all such faults and failings as he might possess and without any right or claim against him in respect of negligent acts arising out of and in the course of his employment. It was in this state of the pleadings, though they were amended when the case was heard by the Court of Appeal, that the matter came before Ormerod J. for trial.

I will at once state the conclusions to which that learned judge came. After stating that the case had been put by counsel for the respondents (plaintiffs in the action) in two ways, first, that upon the ordinary law of contract the servant was liable to his master for damage suffered by him for the servant's breach of contract, it being an implied term of his contract that he would use reasonable care in the performance of his work. and, secondly, that he was as a joint tortfeasor entitled to contribution under section 6 (1)(c) of the Act of 1935, the learned judge said that he was constrained by the words of Denning L.J. in the case of Jones v. Manchester Corporation, [1952] 2 Q.B. 852, 868, to consider the case from the point of view of the Act of 1935. He found as a fact that the appellant had been guilty of negligence, rejected the contention that the claim for contribution could only be raised in the original action, and then proceeded to deal with what he regarded as the substantial defence, namely, that the contract of service was subject to the implied terms to which I have already referred. As to

this he held, following the decision of Finnemore J. in Semtex Ltd. v. Gladstone, [1954] 2 All E.R. 206, (A case, I will interpolate, which was, in my opinion, rightly decided) that, while it must be an implied term that the employer would not require the servant to do anything illegal and therefore would comply with the provisions of the Road Traffic Act, 1930, in respect of insurance, there was no evidence to support any further implication. He . . . held that the respondents were, under the Act of 1935, entitled to a contribution which would amount to a complete indemnity. He gave judgment for the respondents accordingly.

There has, I think, been some confusion in the course of the case between two wholly separate torts, (a) the tort for which the appellant and, vicariously, the respondents might be made liable to Lister senior and in respect of which the respondents could claim contribution under the Act of 1935, and (b) the tort for which the appellant might be made liable to the respondents in respect of his breach of the common law duty of care. But I do not think that this now affects the issue, for, as I shall try to show, the deciding factor, whatever the cause of action, is whether or not certain terms are to be implied in the contract of service between the appellant and the respondents.

The appellant appealed to the Court of Appeal.... Before I state the result of the appeal it is necessary to note that the appellant was allowed to make substantial amendments of his defence and, as they formed the basis of much argument in this House, I will remind your Lordships that by paragraph 7 A it was pleaded that it was an implied term that the appellant should not be required to do anything unlawful and in particular should not be required to drive unless there was in force in relation to the use of the vehicle such a policy of insurance as would provide him with the indemnity required by section 36(1) of the Road Traffic Act, 1930, and by paragraph 7 B that it was an implied term of the contract that the respondents' motor insurance should cover the appellant against any third party liability which he might personally incur arising out of his driving the respondents' vehicles in the course of his employment, and by paragraph 7 C that in breach of these implied terms or one of them the respondents required the appellant to drive a vehicle without there being in force in relation to his user thereof a policy which provided him with any indemnity either as required by the Road Traffic Act, 1930, or at all. . .

In order to explain the appellant's defences which rested on the implied terms in regard to insurance and the Road Traffic Act, 1930, I refer to section 35 (1) of that Act, which provides that subject to the provisions of that part of the Act it shall not be lawful for any person to use or to cause or permit any other person to use a motor-vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of that part of the Act. Section 36(1) states these requirements and, so far as material to this appeal,

provides that such a policy must be a policy which insures such person or persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road, but contains the proviso that such a policy shall not be required to cover liability in respect of the death arising out of and in the course of his employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment.

It appears that in fact the respondents had taken out just such a policy as the Act required excluding such death or injury as the proviso that I have read authorized it to exclude. The policy also provided that the indemnity given thereby should, subject to the provisions thereof, be extended to any person in the employ of the respondents driving the vehicle on their order and for their purposes. They had also taken out a policy insuring them against their liability as employers. This fact is relevant only because the policy contained a term authorizing the underwriters to "prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise", and it has not been concealed that this action was brought by the underwriters in the name of the respondents, who, if it lay with them, would never have brought it. I say that this fact is not otherwise relevant because the action remains the action of the respondents and their rights are not greater or less than they would be if they were uninsured.

Upon the appeal being heard the court was divided, Denning L.J. being in favour of allowing the appeal and Birkett and Romer L.JJ. of dismissing it. It was accordingly dismissed.

It will be convenient to discuss first the question which divided the Court of Appeal, namely, what, if any, were the terms to be implied in the contract of service between the parties.

It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The proposition of law stated by Willes J. in Harmer v. Cornelius (1858), 5 C.B.N.S. 236, 246, has never been questioned: "When a skilled labourer", he said, "artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes, --Spondes peritiam artis. Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. . . An express promise or express representation in the particular case is not necessary." I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction and involve his master in

very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case: on the contrary, "possess" and "exercise" are there conjoined. Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for "skill" is the word used in the cited case, but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty.

I have already said that it does not appear to me to make any difference to the determination of any substantive issue in this case whether the respondents' cause of action lay in tort or breach of contract. But, in deference to Denning L.J., I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) is such a case. It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.

I conclude, then, the first stage of the argument by saying that the appellant was under a contractual obligation of care in the performance of his duty, that he committed a breach of it, that the respondents thereby suffered damage and they are entitled to recover that damage from him, unless it is shown either that the damage is too remote or that there is some other intervening factor which precludes the recovery....

What, then, is to deprive the respondents of their remedy? I do not think it can be said that the damages are too remote, for the injury to a third party and the ensuing liability of a master are events which the exercise of proper care is intended to avert. It is upon the implication of some implied term that the appellant must rely, and to this question I now turn.

My Lords, I cannot but be aware that any decision upon this question, which has divided learned judges in the courts below and upon which your Lordships are also divided in opinion, may have far-reaching consequences, and I have myself had great difficulty in reaching a conclusion.

I will refer first to the implied terms pleaded in the reamended defence, for at the end of the day the argument for the appellant was founded not upon them but upon the original pleas, or at least upon something very like them: the amended pleas can be shortly disposed of. As to paragraph 7 A, the valid answer was made, in general, that the appellant was not required by the respondents to do anything unlawful, and, in particular, that the Road Traffic Act, 1930, does not require that a policy of assurance shall be taken out which provides the driver of a vehicle with an indemnity against all the consequences of his own negligence.

And as to paragraph 7 B, it was answered that a policy taken out by the respondents in fact covered the appellant against third party claims, but that it was not a third party claim that faced the appellant in this action. No more need be said of these pleas, except that the variety and multiplicity of the suggested terms were naturally contrasted with the general principle that an implication must be precise and obvious. I return, then, to the original pleas. These, I remind your Lordships, were contained in paragraphs 4 and 5 of the defence and were alternatives. Paragraph 4 pleaded an implied term that the respondents would indemnify the appellant against all claims and proceedings brought against him for any act done by him in the course of his employment. Were it not that at one time this term appeared to hold first place in the appellant's favour I should have thought that it might be summarily dismissed. It is all-embracing in its scope: whatever the degree of negligence, even of criminality, in his act: whether the respondents were covered by insurance or not, whether the act gave rise to a third party claim, which ought by law to be covered, or not; in every case the appellant would go free and the respondents bear the burden. I can neither accept an implication in such general terms nor put into the mouth of the pleader qualifications which might make the plea less unacceptable. It was in paragraph 5 that the implied term was pleaded which has appeared to me most worthy of consideration. It was that the appellant would receive the benefit of any contract of insurance effected by the respondents and covering their liability in respect of the action brought by Lister senior. It would, it was said, be inconsistent with this term if the respondents, having effected a policy and having been indemnified under it, then sought to recover damages from the appellant either for breach of his contractual duty of care or under the relevant provisions of the Act of 1935. This is the plea which found favour with Denning L.J., and the argument was put so simply and cogently by him that I venture to quote his judgment: "Take this very case", he says, "where the insurers issue a writ in the employer's name against the servant without consulting either the employer or the servant beforehand. When the servant receives the writ he will take it to his employer and say 'Why are you suing me? Surely you have got the money from your insurance company. So you cannot sue me.' This natural comment between master and man throws a flood of light on the implied understanding of the parties." And a little later he says: "This shows that there is an implied term in these cases whereby, if the employer is insured, he will not seek to recover contribution or indemnity from the servant."

It will be observed that the implied term which thus commended itself to the learned Lord Justice is limited in its scope. The driver is to be relieved from liability if his master is covered by insurance against the claim. If he is not covered, for instance, because the accident takes place not on a road but on private premises and the law does not require him to insure against such a risk, and he has not done so, then under this plea the driver must bear the consequences of his negligence if he is himself sued. This consideration led

counsel to yet another variation of the plea. This was that the driver was entitled to be indemnified not only if the employer was in fact insured or was required by law to be insured, but also if he ought, as a reasonable and prudent man, to have been insured against the risk in question. It was in this final form, which approximates nearly to the plea in paragraph 4, that after much travail the implied term was submitted to your Lordships. No qualification of this general proposition was suggested. The driver might owe a duty of care to his employer, but for any dereliction from duty he was to be absolved from all responsibility. Nor was it suggested that in the present case there were any features which distinguished the relation of the appellant and the respondents from that of any other driver and his employer. That is why at the outset of this opinion I said that this appeal raises a question of general importance. For the real question becomes, not what terms can be implied in a contract between two individuals who are assumed to be making a bargain in regard to a particular transaction or course of business; we have to take a wider view, for we are concerned with a general question, which, if not correctly described as a question of status, yet can only be answered by considering the relation in which the drivers of motor-vehicles and their employers generally stand to each other. Just as the duty of care, rightly regarded as a contractual obligation, is imposed on the servant, or the duty not to disclose confidential information. . . or the duty not to betray secret processes... just as the duty is imposed on the master not to require his servant to do any illegal act, just so the question must be asked and answered whether in the world in which we live today it is a necessary condition of the relation of master and man that the master should, to use a broad colloquialism, look after the whole matter of insurance. If I were to try to apply the familiar tests where the question is whether a term should be implied in a particular contract in order to give it what is called business efficacy, I should lose myself in the attempt to formulate it with the necessary precision. The necessarily vague evidence given by the parties and the fact that the action is brought without the assent of the employers shows at least ex post facto how they regarded the position. But this is not conclusive; for, as I have said, the solution of the problem does not rest on the implication of a term in a particular contract of service but upon more general considerations.

My Lords, undoubtedly there are formidable obstacles in the path of the appellant, and they were formidably presented by counsel for the respondents. First, it is urged that it must be irrelevant to the right of the master to sue his servant for breach of duty that the master is insured against its consequences: as a general proposition it has not, I think, been questioned for nearly 200 years that in determining the rights inter se of A and B the fact that one or other of them is insured is to be disregarded. . . And this general proposition, no doubt, applies if A is a master and B his man. But its application to a case or class of case must yield to an express or implied term to the contrary, and, as the question is whether that term should be implied, I am not constrained by an assertion of the general proposition to deny the possible exception. Yet I cannot wholly ignore a principle so widely applicable as that a man insures at his own expense for his own benefit and does not thereby suffer any derogation of his rights against another man.

Next--and here I recur to a difficulty already indicated--if it has become part of the common law of England that, as between the employer and the driver of a motor-vehicle, it is the duty of the former to look after the whole matter of insurance (an expression which I have used compendiously to describe the plea as finally submitted), must not that duty be more precisely defined? It may be answered that in other relationships duties are imposed by law which can only be stated in general terms. Partners owe a duty of faithfulness to each other; what that duty involves in any particular case can only be determined in the light of all its circumstances. Other examples in other branches of the law may occur to your Lordships where a general duty is presented and its scope falls to be determined partly by the general custom of the country which is the basis of the law and partly perhaps by equitable considerations. But even so, the determination must rest on evidence of the custom or on such broad equitable considerations as have from early times guided a court of equity.

In the area in which this appeal is brought there is no evidence to guide your Lordships. The single fact that since the Road Traffic Act of 1930 came into force a measure of insurance against third party risk is compulsory affords no ground for an assumption that an employer will take out a policy which covers more than the Act requires; for instance, a risk of injury to third parties not on the road but in private premises. There is in fact no assumption that can legitimately be made what policy will be taken out and what its terms and qualifications may be. I am unable to satisfy myself that with such a background there can be implied in the relationship of employer and driver any such terms as I have indicated. And though, as I have said, I feel the force of the argument as presented by Denning L.J., I must point out that at least in his view the indemnity of the driver was conditional on a policy which covered the risk having in fact been taken out. It may be that this was because his mind was directed to a case where such a policy was taken out and that he would have gone on to say that there was a further implication that the employer would take out a policy whether required by law to do so or not. But here we are in the realm of speculation. Is it certain that, if the imaginary driver had said to his employer: "Of course you will indemnify me against any damage that I may do however gross my negligence may be," the employer would have said: "Yes, of course!"? For myself I cannot answer confidently that he would have said so or ought to have said so. It may well be that if such a discussion had taken place it might have ended in some agreement between them or in the driver not entering the service of that employer. That I do not know. But I do know that I am ever driven further from an assured certainty what is the term which the law imports into the contract of service between the employer and the driver of a motor-vehicle.

Another argument was at this stage adduced which appeared to me to have some weight. For just as it was urged that a term could not be implied unless it could be defined with precision, so its existence was denied if it could not be shown when it came to birth. Here, it was said, was a duty alleged to arise out of the relation of master and servant in this special sphere of employment which was imposed by the common law. When, then, did it first arise? Not,

surely, when the first country squire exchanged his carriage and horses for a motor-car or the first haulage contractor bought a motor-lorry. Was it when the practice of insurance against third party risk became so common that it was to be expected of the reasonable man or was it only when the Act of 1930 made compulsory and therefore universal what had previously been reasonable and usual?

Then, again, the familiar argument was heard asking where the line is to be drawn. The driver of a motor-car is not the only man in charge of an engine which, if carelessly used, may endanger and injure third parties. The man in charge of a crane was given as an example. If he, by his negligence, injures a third party who then makes his employer vicariously liable, is he entitled to assume that his employer has covered himself by insurance and will indemnify him however gross and reprehensible his negligence? And does this depend on the extent to which insurance against third party risks prevails and is known to prevail in any particular form of employment? Does it depend on the fact that there are fewer cranes than cars and that the master is less likely to drive a crane than a car?

It was contended, too, that a term should not be implied by law of which the social consequences would be harmful. The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, I think, an aspect of the case which made a special appeal to Romer L.J. It cannot be disregarded.

Finally, it was urged that the implication of the suggested term in the contract between employer and driver would have the effect of denying to the insurer the right of subrogation given to him either expressly by the policy of insurance or by the implication of law. This would no doubt be the result. But I do not attach much importance to this. For if the implied term is imposed by law, not in respect of a particular contract but as a legal incident of this kind of contract, the insurer may be assumed to know it as well as anyone else. It may surprise him, but he should study the law.

My Lords, I have come to the conclusion that the considerations which I have discussed do not permit me to imply a term such as is pleaded in any of the alternative forms adopted in the original and amended defence or advanced in argument at the bar, and that the appeal so far as it is founded on an implied term in the contract of service must fail.

I do not find it necessary to discuss at any length the alternative claim under the Act of 1935. If under the first head of claim the respondents can recover damages for breach of contract, they can do no more. I will only say

that I see no reason to doubt that under the Act, and probably apart from the Act. . . the respondents would be entitled to recover contribution from the appellant to the extent of 100 per cent...

In the result, the appeal, in my opinion, cannot succeed and must be dismissed.

LORD RADCLIFFE. My Lords, in my opinion the appeal ought to be allowed and an order made dismissing the respondents' action. Although the argument of the case necessarily travelled over a number of interesting points, there are only two issues which present themselves to be as essential to its decision. I confine myself to them accordingly. The first question is: did the appellant incur any and, if so, what liability to the respondents by virtue of the fact that, while acting as their employee, he drove their lorry negligently and thereby injured a third party? The second is: are the respondents entitled to enforce any such liability by legal action against the appellant, having regard to the circumstances of his employment and in particular the statutory scheme of compulsory insurance against third party risks which related to his employment?

On the first point I think it plain that the law does impute to an employee a duty to exercise reasonable care in his handling of his employer's property. It is the fact of such employment that places the property within his control; and if, as must be the case, he owes a general duty to all concerned not to be negligent in his exercise of that control, it would be a surprising anomaly that, merely because there was also a contractual relationship between himself and his employer, the standard of his obligation to his employer were to be somehow lower than the standard of his obligation to the outside world.

I cannot see any good reason why we should uphold the existence of such an anomaly. If the contract of employment is viewed as a general legal relationship in which the law imputes certain rights and responsibilities to each side, it would assign a very undignified position to the employee to suppose that the employer takes him "with all faults" and that the employee does not by virtue of his engagement impliedly undertake to use all reasonable care in the conduct of his employer's affairs. To say this is to say nothing new in the law. I am satisfied that from early times the law has consistently recognized the existence of this duty. I need not lengthen my opinion by reciting the authorities, some of which are noticed by others of your Lordships.

Nor does any different result appear if we attend to the circumstances of this particular employment. Certainly the appellant was a youth of 17 when he began to drive for the respondents. But he was required to take and did take his driving tests before he took up the job, and there is nothing in the relationship which excludes an expectation of reasonable skill and care. Actually, I should regard the

implications of his present employment as being determined by the circumstances in which he was re-employed after the end of the late war. He "came back as a full time driver."

It was much canvassed in argument before your Lordships whether, if there was some such duty on the appellant, it was anything more than the general duty he owed the world to avoid the tort of negligence. On one view of the case this would indeed be a question of some importance in respect of costs. Since I take a different view as to the proper result of the case anyway, I do not need to dwell on this part of it. It is perhaps sufficient if I say that, in my view, this question is a somewhat artificial one. The existence of the duty arising out of the relationship between employer and employed was recognized by the law without the institution of an analytical inquiry whether the duty was in essence contractual or tortious. What mattered was that the duty was there. A duty may exist by contract, express or implied. Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract. It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and, although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other.

I have said this much out of respect to that part of the judgment of Denning L.J. in the Court of Appeal which deals with this topic. I do not agree with him that "the action against a servant must be founded on tort", and I do not think that his citation of authorities proves this point.

When I turn to the second issue with which I wish to deal, it seems unlikely that any decided authority will be of direct assistance. For the critical point is that we have to deal with an employment which it was illegal for the employer to authorize or for the employed to pursue unless insurance cover had been provided against third party liability. What are the necessary consequences of that legal requirement upon the respective rights and liabilities of employer and employed?

That there were some consequences has been common ground throughout this case. It is accepted that the law must impute a term to the effect that the employee could not be required to carry out any order that would involve him in doing something that was illegal, even though, but for the illegality, the thing required would have been within the normal scope of his duties. Put into non-theoretical language, that means that because of the Road Traffic Act, 1930, the appellant could not be employed to drive the respondents'

lorry for them on the road unless there existed a policy of insurance complying with the conditions of the Act and so providing cover to indemnify any third party who might suffer actionable damage from the appellant's driving of the lorry.

Now, the insurance policy required could not come into existence of its own motion. One of the two parties, employer and employed, had to assume responsibility for taking it out or keeping it running and for paying up the necessary premiums to buy the cover. To which of them ought we to attribute that responsibility, having regard to the relationship of the parties? In my view, to the employer. I cannot suppose that, short of special stipulation, any other answer would be given in such a case. So far as it is relevant, all the evidence given at the trial, both by the appellant and by Colonel Howis, the respondents' managing director, confirms that this would be the right answer.

Is it, then, consistent with such an arrangement that, if the driver does cause third party damage by negligence and the person injured sues and recovers damages from the employer on the ground of his vicarious responsibility for the act of his servant, the employer should be able to recover over the damages that he has to pay by suing the driver? In my opinion, that is the simple question on which this appeal turns, but, of course, it is in practice impossible to keep it simple owing to the complications which emerge in any well-argued case. I will try briefly to notice some of them. It is not that I do not think that they involve difficulties, but the difficulties do not present themselves to me as being such as should affect the final result.

In the first place, I do not think that it matters whether the employer is really or only ostensibly the plaintiff. In this casenwe know, because no secret has been made of it, that the real plaintiff is one of the two insurance companies concerned. But the defendant's point, if it is a good one at all, is equally good whether it is his employer who is claiming against him or the insurers by subrogation. To each his reply is the same--"I and my employer recognized that a fund of money had to be secured by insurance to take care of any third party liability that my driving might involve us in, and we arranged that he should pay for and provide the insurance policy that would produce the money. It follows from that that he cannot now look to me to find all or part of that money." If that answer is a good reply to the employer, it is good against insurers who are subrogated to him. I do not at all understand the idea that it is somehow hard on the insurers that they should be affected by an implied term that bound the person to whose rights they are claiming to be subrogated.

Secondly, it is, I think, true that it would not have been illegal in the circumstances of this particular accident if there had been no insurance policy against third party liability. I assume, though we did not have any detailed argument about it, that the yard in which the accident took place was not a "road" within the meaning of the Road Traffic Act, 1930; and also that the Act does not make it compulsory to provide insurance against injury caused to another servant of the same employer. But if we take it, as in my view, we must, that the existence of compulsory insurance under the Act involved that it was a term of the employment that the driving should be covered by a policy against third

party liability, I do not think that the term postulated should be tied down to all the complications and qualifications which arise on a strict interpretation of the Act. What mattered to the parties was that, while the lorry was being driven on the employer's business, someone might be injured in circumstances that entitled him to recover damages from either employer or employee or both of them. From that point of view it did not signify whether the accident occurred on a road or in a yard that turned off it or whether the person injured was or was not in the employer's service. Any other view would leave it to the employee to take out his own policy to cover the residual risks, and this does not seem to me a reasonable arrangement to impute to the parties.

In fact, as we know, the employer provided insurance at his own expense by means of two separate policies, and these between them secured cover without excepting accidents off a road or injury to a fellow employee. Moreover, the motor-vehicle policy took what is certainly not the uncommon form of including a "third party extension", the effect of which was that the driver was equipped with his own direct right to call for indemnity from the insurers if he became liable to a third party for damages caused while driving the respondents' lorry.

I must call attention to this last point because it illustrates the almost intolerable anomalies which are involved in the respondents' argument. The situation is this. If an accident takes place through negligence, the person injured can sue either employer or employed or both of them. If he sues the employee alone, the latter calls on the insurance company for the cover which the employer has bought him; the insurance company has to provide the fund of damages required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer either alone or jointly with the employee, the position of the employee is, apparently, much worse and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide, is, in the end, the one who foots the bill. I should be very much interested to know how the premium required by an insurance company is adjusted to the risk of these alternative situations.

My Lords, on this part of the case I take the same view as that taken by Denning L.J. I agree with what he says. . . and I do not think it possible to escape the force of his reasoning. If we assume any understanding at all between the appellant and respondents as to insurance against third party liability, to the appellant's inquiry as to who was to provide it, the respondents must have answered: "We will see to that and the expense of providing it will fall on us": but the result of this appeal depends upon which of the following alternatives they must be taken to have added. One would be to this effect--"But, of course, you understand that although we are going to secure the moneys required to pay the injured person in the first instance, you will have

to make them good ultimately, either to us or to the insurance company." The other would be--"and, of course, it is understood that, since we are providing for the fund that will indemnify the injured person, that closes any question of our calling upon you at any time to contribute to that fund." I can only say that to me the first alternative seems a contradiction of what is involved in the respondents' undertaking to pay for and provide the fund. The second seems to be the natural exchange to take place between the company and their lorry driver.

I am, therefore, in favour of allowing the appeal. I think it a very difficult point and I well understand the difference of approach that leads us in this House to different conclusions. I ought, however, to say something about two considerations which have been advanced on behalf of the respondents but which are to me unpersuasive. It is said that to imply such a term as I propose is in effect to contradict the general duty of the employee to exercise reasonable care in carrying out his employer's work. I do not think that this is so. The general duty remains and it will have its legal effect on all acts of the employee which do not touch this question of insurance against third party liability. It is the special system whereby this form of insurance is a necessary condition of the employment which brings about the special result.

Then it is sought to show that the term in question cannot exist in law because it has never been heard of before this case. When did it first enter into the relations of employer and employed? Could it really have existed since the Road Traffic Act, 1930, if it did not exist before it? My Lords, I do not know because I do not think that I need to know. After all, we need not speak of the master's action against his servant for negligence as it it had been common fare at the law for centuries. Economic reasons alone would have made the action a rarity. If such actions are now to be the usual practice I think it neither too soon nor too late to examine afresh some of their implications in a society which has been almost revolutionized by the growth of all forms of insurance. No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movements may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.

[The judgments of Lord Morton of Henryton and Lord Tucker in favour of dismissing the appeal are omitted. Lord Somervell of Harrow wrote a dissenting judgment in which he indicated that in a case of this kind there should be implied a term in the contract of employment that the employer will see that his driver's resources are protected by insurance in the same way that an owner driver provides for himself. He also referred to the statement of Romer L.J. in the Court of Appeal, that it was not in the public interest that drivers should be immune from the financial consequences of their negligence and said: "The public interest has for long tolerated owners being so immune, and it would, I think, be unreasonable if it was to discriminate against those who earned

their living by driving. Both are subject to the sanction of the criminal law as to careless or dangerous driving. The driver has a further sanction in that accidents causing damage are likely to hinder his advancement."]

[In Harvey v. R. G. O'Dell Ltd., [1958] 2 Q.B. 78, a servant, employed as a storekeeper, used his motor-cycle from time to time on his master's business with the consent of the latter and as a favour to him. While the master was held liable for an injury caused a third person from the negligent operation of the motor-cycle, McNair J. refused to hold that the employee had impliedly agreed to indemnify his master if he committed a casual act of negligence in the operation of the motor-cycle which he had made available for his employer's business on a particular occasion. "Suppose in a time of labour disturbances in the docks, master stevedores, as sometimes happens, induce their office staff to man the cranes or to do stevedoring; if a third party is injured through the negligence of such staff, no doubt the master stevedores would be vicariously liable, as, indeed, they might be primarily liable, on the basis that they had employed unskilled persons. But it would surely be contrary to all reason and justice to hold that the willing office staff, by abandoning their ledgers and undertaking manual tasks, had impliedly agreed to indemnify their employers against liability arising from their negligence in performing work which they were not employed to do." He held, however, that the employee and his master were "in law joint tort-feasors and since the employer's liability was "purely vicarious" his claim for contribution under the English Law Reform (Married Women and Tortfeasors) Act, 1935 should be for 100 per cent.

In The Koursk, [1924] P. 140 at p. 145, Scrutton L.J. said: "What is meant by 'joint tortfeasors'? and one way of answering it is: 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors': The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort."

In Sheppard Publishing Co. Ltd. v. Press Publishing Co. Ltd. (1905), 10 O.L.R. 243 a plaintiff sued both master and servant for the servant's tort. Judgment was given at the trial against the servant and the action against the master dismissed. On appeal the master raised the objection that having taken judgment against the agent, the plaintiff was barred from further proceeding against the principal. The Court said: "It is quite true that in acts of joint tort if one of the joint tortfeasors be sued and judgment recovered against him, that is a bar to the further action against his joint tortfeasors. But here the action was brought against both, judgment was obtained against one, and the plaintiff is now moving for judgment against the other. This, is has a right to do."

In Bright & Co. Ltd. v. Kerr, [1939] S.C.R. 83 on appeal from [1940] O.R. 140, a similar situation arose with the added fact that the plaintiff had caused the judgment against the servant to be entered and had taken attachment

proceedings against the servant under the judgment. Middleton J.A. in the Ontario Court held that the parties being joint tortfeasors, the action taken against the servant deprived the plaintiff of any cause of action against the master. He relied, however, on contract cases where the liability of principal and agent is "alternative". McTague J.A. in the same Court said: "This is not a type of action in which the plaintiff is bound to elect. Vicarious liability is not substituted liability. The matter is dealt with by Rowell C.J.O. in Kerr v. Bright, but on the principle of joint tortfeasors which I do not think applies. As pointed out by Duff C.J.C. . . . 'respondeat superior is a rule which does not rest upon any notion of imputed guilt or fault'... The liability, if any, arises from the relationship and no question of election arises. The master cannot bo liable in law unless the servant is liable. The railway company was sued along with Stinson, and I think nothing precludes the plaintiffs from realizing on the judgment against Stinson while the liability of the railway company is still in appeal. It might be different in a case on contract against principal and agent." In the Supreme Court of Canada, Duff C.J.C. merely said that the "rule of procedure" in Brinsmead v. Harrison (1872), L.R. 7 C.P. 547, could not operate to nullify the plaintiffs' right to appeal. Crocket J. agreed with McTague J.A. Kerwin J. said, "whether or not in the case of a tort by a servant in the course of his employment the liability of the master and servant be joint, it is not alternative". He, therefore, approved the ruling of the Sheppard case in the "special circumstances".]

MORRIS v. FORD MOTOR CO. [1973] 2 W.L.R. 843 (C.A.)

March 27. The following judgments were read.

LORD DENNING M.R. On January 26, 1969, Mr. Eric Morris, the plaintiff was working at the huge motor factory owned by the Ford Motor Co. Ltd., the defendants, at Halewood in Lancashire. He was not employed by Fords but by a firm of cleaners—Cameron Industrial Services Ltd., the third party, who had contracted to clean the factory. Whilst at his work, Morris was injured. It was all due to the negligence of one of Fords' servants. This servant was one Mr. Frederick Roberts, the fourth party. He drove a fork-lift truck without keeping a proper lookout. In consequence Morris's leg was jammed against a wall. Morris was not very seriously injured. His damages were only £686·95. But his claim has given rise to an interesting point. It arises in this way.

Morris issued a writ against Fords claiming damages for injuries caused by the negligence of Fords' servant. Fords then served a third-party notice against the firm of cleaners claiming an indemnity. Fords said that, under the cleaning contract, the firm of cleaners had contracted to indemnify Fords against any liability to Morris, even though it was caused by the negligence of Fords' own servants. The firm of cleaners then issued a fourth-party notice against Roberts personally. He was the servant of Fords who was driving the fork-lift truck.

Now this firm of cleaners had obviously no claim on their own account against Roberts. Roberts by his negligence had done no damage to the property or person of the cleaners themselves. He had only done damage to their servant Morris. Roberts was, therefore, liable to Morris. So also were Fords liable to Morris because they were the employers of Roberts.

Roberts and Fords were joint tortfeasors. Morris could, if he had wished, have sued them together and got judgment against both of them. As it was, he sued Fords only. He got damages against them. Thereupon Fords could themselves have sued their own servant Roberts on the ground that Roberts owed Fords a duty to drive the truck carefully: and that his negligence had involved Fords in liability to Morris. If Fords had sued Roberts, they would no doubt have got judgment against him for the full amount which they had had to pay to Morris. That is clear from the decision of the House of Lords in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555.

But, in point of fact, Fords would never, for a moment, have dreamt of suing their own servant Roberts. If they did so, all the men would have come out on strike. The men would say, with great force: "This sum should be paid by the insurance company, and not by Roberts himself." To make him pay personally for an accident at the works would be most unfair.

But, although Fords would not themselves sue their own servant Roberts, the firm of cleaners seek to sue him. The cleaners cannot, of course, sue Roberts in their own name. But they assert that they are entitled to use Fords' name to sue Roberts. Using the lawyer's words, the cleaners say that they are entitled "to be subrogated" to the rights of Fords against Roberts. Using the layman's words, the cleaners say that they are entitled to "stand in the shoes of Fords" and to exercise against Roberts all the rights which Fords have against him.

If the cleaners are right in this contention—if they can thus force Roberts to pay the damages personally—it would imperil good industrial relations. When a man such as Roberts makes a mistake—like not keeping a good lookout—and someone is injured, no one expects the man himself to have to pay the damages, personally. It is rather like the driver of a car on the road. The damages are expected to be borne by the insurers. The courts themselves recognise this every day. They would not find negligence so readily—or award sums of such increasing magnitude—except on the footing that the damages are to be borne, not by the man himself, but by an insurance company. If the man himself is made to pay, he will feel much aggrieved. He will say to his employers: "Surely this liability is covered by insurance." He is employed to do his master's work, to drive his master's trucks, and to cope with situations presented to him by his master. The risks attendant on that work—including liability for negligence—should be borne by the master. The master takes the benefit and should bear the burden. The wages are fixed on that basis. If the servant is to bear the risk, his wages ought to be increased to cover it.

It was such considerations as these which prompted the Minister of Labour in 1957 to appoint an inter-departmental committee to study the implications of *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555. The committee made its report in 1959 [36-244]. It did not recommend legislation to reverse that decision because it felt that insurers would not abuse it. It said:

> "The decision in the *Lister* case shows that employers and their insurers have rights against employees which, if exploited unreasonably, would endanger good industrial relations. We think that employers and insurers, if only in their own interests, will not so exploit their rights. . . ."

A In consequence of that report, the members of the British Insurance Association adhered to this "gentleman's agreement":

> "Employers' Liability Insurers agree that they will not institute a claim against the employee of an insured employer in respect of the death of or injury to a fellow-employee unless the weight of evidence clearly indicates (i) collusion or (ii) wilful misconduct on the part of
B the employee against whom a claim is made."

According to that agreement, if Roberts, the driver of the fork-lift truck, had injured one of Fords' own employees, the injured employee would have his remedy against Fords, who would be indemnified by Fords' insurers, but those insurers would not seek to recover the amount from Roberts, the driver.

The present case does not come within the "gentleman's agreement"; because the injured man, Morris, was not an employee of Fords but was an employee of the firm of cleaners. So the cleaners claim to make Mr. Roberts, Fords' driver, personally liable. Fords object to this. In their view it would produce serious industrial repercussions. But, despite Fords' objection, the cleaners are determined to press their claim to be subrogated to the rights of Fords. The claim is based on the contract of indemnity, to which I will now turn.

The contract of indemnity

Fords employed the firm of cleaners to clean the factory under a contract which contained a number of general clauses. These were applicable to an order given by the purchaser (Fords) to the contractor (the cleaners). These dealt with: (1) working hours; (2) payment for daytime and overtime; (3) increased costs; (4) responsibility for materials, etc. on the site; (5) labour and plant. Then clause 6 dealt with "insurance and third party risks." The material sub-clause is 6 (b), which says:

> "The contractor [the cleaners] shall indemnify the purchaser [Fords] against all losses and claims of whatsoever nature for or in respect of injuries or damage to any person or property howsoever caused arising out of or in connection with the performance of the order [for cleaning to be done] and also against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto, and without prejudice to the generality of the foregoing the contractor [the cleaners] shall be liable to indemnify the purchaser [Fords] under this clause whether the loss or claim is occasioned by or arises from the negligence or breach of statutory duty of the purchaser [Fords], the contractor [the cleaners] or any sub-contractor or their respective servants or agents."

It is conceded that under that clause the cleaners are bound to indemnify Fords against their liability to Morris. Then there is a note in bigger blacker type directed to the contractor (the cleaners):

> "N.B. You are advised to arrange if necessary for the extension of your employers liability and third party policies to include your contractual liability having regards particularly to clause 6 (a) and (b)."

The doctrine of subrogation

This is a contract which contains an indemnity. As such, it gives rise to a right in the indemnifier to be subrogated to the rights of the indemnified. But it is necessary to analyse this right. In particular, to see whether it gives the indemnifier a right to sue in the name of the indemnified.

Let me first distinguish it from a contract of suretyship. When a surety pays off the debt, he is entitled in his own name to sue the principal debtor for the amount, or to sue his co-sureties for contribution. He is entitled to any securities which may have been given for the debt by the principal debtor to the creditor. These rights do not depend upon contract, but upon the established principles of the courts of equity. It was so stated by Sir Samuel Romilly in his argument in *Craythorne* v. *Swinburne* (1807) 14 Ves.Jun. 160, 162, which was approved by Lord Eldon L.C., at p. 169. Also by Lord Selborne L.C. and Lord Blackburn in *Duncan, Fox & Co.* v. *North and South Wales Bank* (1880) 6 App.Cas. 1, 12, 18, 19.

Now I turn to contracts of indemnity. Where an insurer—or any other person who enters into a contract to indemnify another—pays the amount of the loss or damages to the insured, he is entitled to the advantages of every right of action of the assured, whether in contract or in tort, which may go in diminution of the loss: see *Castellain* v. *Preston* (1883) 11 Q.B.D. 380; *H. Cousins & Co. Ltd.* v. *D. & C. Carriers Ltd.* [1971] 2 Q.B. 230. This entitlement, too, does not depend on the contract itself but on the "plainest equity." At any rate, Lord Hardwicke L.C. said so: see *Randal* v. *Cockran* (1748) 1 Ves.Sen. 97 as explained in *Yates* v. *Whyte* (1838) 4 Bing.N.C. 272, 283. But this entitlement does not amount to an *assignment* of the right of action. It does not entitle the insurer or indemnifier to sue *in his own name* a wrongdoer who has caused the loss or damage: see *London Assurance Co.* v. *Sainsbury* (1783) 3 Doug.

K.B. 245; *Simpson & Co.* v. *Thomson* (1877) 3 App.Cas. 279. In order to sue the wrongdoer, the insurer or indemnifier must use the name of the insured or party indemnified: see *Mason* v. *Sainsbury* (1782) 3 Doug. K.B. 61. But the important point to notice is this: the insurer had no right *at law* to make use of the name of the assured. If the assured did not consent to it, the insurer had to go to a court of equity to compel him to allow it. And the court of equity could impose such terms as it thought fit. Take this case: suppose an insurer, *without* the consent of the assured, brings an action in the name of the assured against the wrongdoer. The action fails, and costs are awarded against the assured. The insurer does not pay the costs. He may be insolvent and not have the money to pay the costs. In that case the assured would have to pay the costs himself. That cannot be right. So it was always held that, if an insured did not consent to his name being used, the insurer had to go to a court of equity to compel him to allow his name to be used: see *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.* [1962] 2 Q.B. 330, 339, *per* Diplock J. A court of equity would only compel it on such terms as were just and equitable. It might, for instance, insist on the insurer giving security for the costs: see *John Edwards & Co.* v. *Motor Union Insurance Co. Ltd.* [1922] 2 K.B. 249, 254. Strangely enough, no case has been found in the reports in which a court of equity has been asked to compel a man to give his name to be used in action of tort. At any rate Mr. Arthur Cohen, Q.C., one of the best lawyers of the last century, did not find one: see *King* v. *Victoria Insurance Co. Ltd.* [1896] A.C. 250, 256. So I do not suppose I could. But, the very fact that the insurer had to go to a court of equity shows that the right of the insurer to sue in the name of the assured arises in equity and not by virtue of an implied contract.

I should say, for sake of completeness, that if the insured assigns his rights of action to the insurers and notice of the assignment is given to the wrongdoer, the insurer can now sue in his own name: see *Compania Colombiana de Seguros* v. *Pacific Steam Navigation Co.* [1965] 1 Q.B. 101. But, otherwise, unless the assured consents, the insurer has to resort to equity.

What is the equity in this case?

In my opinion, therefore, this case is to be tested according to the principles of equity. Before the Judicature Acts, the question would be: would a court of equity compel Fords to allow their name to be used to sue their servant, Roberts? Since the Judicature Acts, the question is: is it just and equitable that Fords should be compelled to sue, or to lend their name to sue, their own servant, Roberts, for damages, so as to make him personally liable? My answer to that is emphatic. It is not just and equitable. In the contract with the cleaners, Fords advised the cleaners to arrange with their insurance company to cover their liability under the indemnity. I expect they did so. Their insurance company has received the premiums, and should bear the loss. It should not seek to make Roberts personally liable. Everyone knows that risks such as these are covered by insurance. So they should be, when a man is doing his employer's work, with his employer's plant and equipment, and happens to make a mistake. To make the servant personally liable would not only lead to a strike. It would be positively unjust. *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555 was an unfortunate decision. Its ill effects have been avoided only by an agreement between insurers not to enforce it. It should not be extended to this case. I would apply this simple principle: where the risk of a servant's negligence is covered by insurance, his employer should not seek to make that servant liable for it. At any rate, the courts should not compel him to allow his name to be used to do it.

Implied contract

If I am wrong in putting the right of subrogation on principles of equity, then it must be put on implied contract. Diplock J. so put it in *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.* [1962] 2 Q.B. 330, when he said at pp. 339–340:

> "The expression 'subrogation' in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy. . . ."

Tested in this way, the question would be: in the contract between Fords and the cleaners, was there an implied term that, if the cleaners paid under the indemnity, they should be entitled to use Fords' name so as to sue Fords' servant? The answer is clearly, No. If the circumstances had been put to any of those concerned they would have said: "The risks must be covered by insurance effected by the cleaners. The insurance company must pay the amount. They cannot come down on the servant personally."

Conclusion

In my opinion the doctrine of subrogation cannot be used here so as to entitle the cleaners or their insurers to sue Roberts and make him personally liable. No matter whether it arises in equity or in contract, the doctrine cannot be carried so far. I would, therefore, allow the appeal and dismiss the claim for subrogation.

JAMES L.J. Eric Morris, the plaintiff, a servant of Cameron Industrial Services Ltd., the third party, was employed at the Ford Motor Co.'s, the defendants, premises at Halewood. On January 26, 1969, in the course of his employment the plaintiff suffered injury when his leg was trapped against a wall by reason of the negligent driving of a fork lift truck by Frederick Roberts in the course of his employment by the defendants. The plaintiff sued the defendants alleging that the negligence of their servant, Roberts, caused his injuries. The defendants eventually settled the plaintiff's claim for £686·95 and £305·69 costs. The defendants brought into the action the third party, claiming against them an indemnity in respect of the defendants' liability to the plaintiff. The claim was based upon a contract between the defendants and the third party. The contract provided for the third party to perform for reward cleaning services at the defendants' factory. It included the defendants' general clauses of contract. The relevant clause is number 6 (b), (c) and (d).

> "(b) The contractor shall indemnify the purchaser against all losses and claims of whatsoever nature for or in respect of injuries or damage to any person or property howsoever caused arising out of or in connection with the performance of the order and also against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto, and without prejudice to the generality of the foregoing the contractor shall be liable to indemnify the purchaser under this clause whether the loss or claim is occasioned by or arises from the negligence or breach of statutory duty of the purchaser, the contractor or any sub-contractor or their respective servants or agents. (c) The contractor shall insure and keep insured during the continuance of the order in the joint names of the purchaser and the contractor all liabilities which may attach to them or either of them for any injury, loss or damage to any person or property arising out of or in connection with the performance of the order.

depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. . . . It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss."

Per Bowen L.J., at p. 403:

"And subrogation is itself only the particular application of the principle of indemnity to a special subject matter, and there I think is where the learned judge has gone wrong. He has taken the term 'subrogation' and has applied it as if it were a hard and fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts to be carried out in the name of the assured, or whether he is suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss? In this case the right whatever it be has been actually enforced, and all that we have to consider is whether the fruit of that right after it is enforced does not belong to the insurers. It is insisted that only those payments are to be taken into consideration which have been made in respect of the loss. I ask why, and where is the authority? If the payment diminishes the loss, to my mind it falls within the application of the law of indemnity."

In *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.* [1962] 2 Q.B. 330, the plaintiff insurers sought to recover from the assured, to whom they had paid £72,000 on a total loss basis, the sum of nearly £127,000 which the assured had been paid by the Canadian Government in respect of the loss. It was held that the excess over £72,000 was not recoverable. Diplock J. said, at pp. 339–340:

"The expression 'subrogation' in relation to a contract of marine insurance is thus no more than a convenient way of referring to those terms which are to be implied in the contract between the assured and the insurer to give business efficacy to an agreement whereby the assured in the case of a loss against which the policy has been made shall be fully indemnified, and never more than fully indemnified."

At pp. 340–341:

"In my view the doctrine of subrogation in insurance law requires one to imply in contracts of marine insurance only such terms as are necessary to ensure that, notwithstanding that the insurer has made a payment under the policy, the assured shall not be entitled to retain, as against the insurer, a greater sum than what is ultimately shown to be his actual loss."

Diplock J. then cites the words of Cotton L.J. in *Castellain* v. *Preston*, 11 Q.B.D. 380, 395:

"'If there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is.'"

In my judgment the right of subrogation in contracts of insurance depends upon the essential element of the contract being one of indemnity. Moreover, I can find no authority for the proposition that the right is restricted to "contracts of *insurance* of indemnity only." Where there is

a contract of indemnity there exists a right in the indemnifier to reimburse himself to the extent that he has paid, and to this end the law provides that he can exercise the personal rights and remedies of the person indemnified by proceeding in that person's name.

Is this present case one of a contract of indemnity? I think it is. Mr. Ogden argues that it is a contract for cleaning services not a contract of indemnity. But what of a covenant in a lease on the part of a tenant to indemnify the landlord against damage to third persons caused by acts of the tenant? It cannot be said that such is no indemnity because it is in a lease. Clause 6, in my judgment, is in its terms a contract whereby the third party agrees to indemnify the defendant company and the nature of the contract does not change because it is one of a number of terms of another contract.

It is argued by Mr. Ogden that it is not necessary to give business efficacy to clause 6 that a term should be implied that the third party should, on indemnifying the defendants, by subrogation be able to exercise the defendants' rights and remedies against others. He argues that the facts are such that it cannot be said that such an implied term is so necessary that the parties to the contract must be taken to have contracted upon that basis. I am unable to accept those arguments. I do not consider that it is a question of implying a term importing a right of subrogation: the right is there in the nature of the contract of indemnity, unless it can be shown that the contract expressly or by implication excludes the right of subrogation either wholly or in part. It is open to the parties to a contract of indemnity to contract on the terms of their choice, and by the terms they choose they can exclude rights which would otherwise attach to the contract.

In relation to Mr. Ogden's argument that there is no necessity to imply, and it would be wrong to imply, a term entitling the third party to exercise the defendants' remedy against the fourth party, in view of the relationship between the defendants and the fourth party, I would look at the matter in a different way. I pose the question, is there evidence which establishes that this contract of indemnity excluded, expressly or impliedly, the right of subrogation to the defendants' rights and remedies against a servant of the defendants? If there is then the third party is not entitled to the declaration. If there is not, then the ordinary incidents of a contract of indemnity entitle the third party to succeed.

The contract incorporating the indemnity clause was made on February 18, 1969. It was admitted as between the defendants and third party that the contract was for the third party "to supply all labour, plant, and to carry out cleaning services at the premises of the defendants." The terms of clause 6 provided for indemnity to the fullest possible extent and, in particular, refer to losses and claims occasioned by or arising from negligence of servants or agents of the defendants. The third party was required to insure against the liabilities within the scope of the indemnity.

This contract was made some 12 years after the decision in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555 and after the report of the inter-departmental committee appointed in 1957 by the Minister of Labour and National Service to study the implications of the judgments in that case as they might affect the relations between employers and workers. The report was published in 1959.

In *Lister's* case, an employee of the company employed to drive a motor vehicle injured his father whom he had taken as his mate. The father recovered damages from the company on the ground of his son's negligence in driving the vehicle. The company then sued the driver on the ground that he was a joint tortfeasor against whom the company was entitled to contribution and on the ground that the company was entitled to damages for breach of an implied term that he would exercise reasonable care in the performance of his duties as servant. It was held, Lord Radcliffe and Lord Somervell of Harrow dissenting, that there was no implied term in the contract of employment that the employers would indemnify the servant (whether the company was insured against the servant's negligence or was required by statute to be insured against that risk or ought, as a reasonably prudent employer, to have taken out a policy of insurance against that risk) and that the company was entitled to recover damages from the driver, their servant. That represents the present law.

The inter-departmental committee reached the following conclusions:

> "The decision in the *Lister* case shows that employers and their insurers have rights against employees which, if exploited unreasonably, would endanger good industrial relations. We think that employers and insurers, if only in their own interests, will not so exploit their rights and the evidence we have received as to the action taken by the British Employers' Confederation and the insurance industry seems to us to support this view. We do not therefore think that the decision in the *Lister* case has exposed a practical problem or that there is any need for legislation at present. If in future it should appear that employers or insurers were exploiting their rights unreasonably, the problem would, we think, have to be reviewed; in that event further consideration might be given to the possible legislative measures which we have mentioned in our report and the various objections to them. Our conclusion does not, however, rule out any further effort to deal with the matter by voluntary methods, such as extension of the 'gentleman's agreement' within the insurance field, or by collective bargaining in any individual industry."

The report and the conclusions of the committee were considered by the legislation committee of the British Insurance Association with the result that the association's then deputy chairman wrote a letter, dated October 23, 1959, to all members of the association. The letter is an agreed document in the present case. It appears from that piece of evidence that the B.I.A. Committee felt

> "that insurers generally would agree that the common interest of all demands that, save possibly in case of collusion or wilful misconduct, no action should come before the courts which would redirect attention to the issues involved in *Lister's* case."

The writer of the letter invited the addressees, in their common interest (a) to confirm adherence to a revised "gentleman's agreement" as follows:

> "Employers Liability Insurers agree that they will not institute a claim against the employee of an insured employer in respect of death of or injury to a fellow employee, unless the weight of evidence clearly indicates (1) collusion or (2) wilful misconduct, on the part of the employee against whom the claim is made. The agreement shall apply in priority to the provisions of any claims agreements operating between insurers who subscribe to this agreement."

The reference to a revised agreement relates to an earlier agreement in 1953.

The letter expressly disavows any intention of interfering with the rights of members to deal with their own claims, and asserted the purpose of affording an opportunity of avoiding action which might damage the interests of insurers as a whole. The proposed "gentleman's agreement" was limited to claims in respect of "death of or injury to a fellow employee." The present case does not fall within that limited area as the plaintiff was not a fellow employee of the fourth party.

The evidence, however, goes further. Evidence was given by Mr. Davidson, a labour relations officer employed on the central staff of the defendant company. He said that the defendants never sued their servants; that the defendants were aware that to pursue action against an employee for negligence would be to court industrial action in the form of strikes; that serious industrial repercussions would follow if the defendants entered into contracts with others, under the terms of which concontracts the employees of the defendants might be sued by the other contracting party, or insurers, in an action brought in the name of the defendants.

There is no evidence that the defendants' attitude to possible action against their employees was expressly brought to the attention of the third party at the time of contracting. It is, in my judgment, impossible to say that any right of subrogation was expressly excluded by the terms of the contract from the provision for indemnity. What of implied exclusion? The court cannot shut its eyes to the realities of the situation. In 1969 the implications of the law as confirmed and decided in *Lister's* case [1957] A.C. 555 were well known among employers (the defendants included). Employers' liability insurance, despite the absence of any legal obligation owed by an employer to his employee to insure against liability for negligence, was commonly if not universally used as the means of

satisfying the liability of the servant; the industrial repercussions referred to in Mr. Davidson's evidence would, as a matter of common knowledge, be of general application and not confined to the defendants. There is an express indication in the terms of the note following clause 6 that the contracting parties recognised that any loss or claim within the indemnity should rest with the third party or their insurers. The defendants had adopted a policy renouncing their entitlement to sue their servants for negligence.

The point is finely balanced but, in my judgment, the terms of this indemnity in the context of this contract do not give rise to a right of subrogation in the third party. The terms do not give rise to that right because there is to be implied a term whereby it is excluded. The implied term springs from the nature and terms of the contract between these parties. Their agreement was operative in an industrial setting in which subrogation of the third party to the rights and remedies of the defendants against their employees would be unacceptable and unrealistic.

I would allow the appeal.

Stamp L.J. dissented on the ground that no exclusion could be implied.

Chapter IV: The Independent Contractor

THE CITY OF ST. JOHN v. DONALD. Supreme Court of Canada. [1926] S.C.R. 371.

Appeal from the decision of the Supreme Court of New Brunswick, Appeal Division, affirming the judgment of Crockett J. (who tried the case with a jury) in favour of the plaintiff, in an action for damages to plaintiff's property caused by an explosion of dynamite.

ANGLIN, C.J.C. The plaintiff sues to recover damages for injury to his house caused by an explosion of dynamite stored by the defendant Moses in a shack nearby. Moses was employed by his co-defendant, the city of St. John, as a contractor to deepen Newman's Brook, which crosses Adelaide St. in that city. The authority of the city to undertake this work is not questioned; neither is any doubt cast upon its right to employ a contractor to perform it.

The use of dynamite or some other powerful explosive for blasting was necessary for the economical carrying out of the work, which involved rock excavation. A short time before the explosion occurred, Moses had caused a quantity of 40 per cent. Dynamite--estimated at about 50 pounds--to be placed in a shack which he had erected on, or immediately adjoining Adelaide St. and adjacent to the work. This shack was built for use as a toolhouse. It also contained a forge for blacksmithing purposes in connection with the work.

The jury found that the storing of the dynamite in a shed used also as a storehouse for tools instead of keeping it locked up in a separate structure used for explosives only was negligence which caused the explosion. While the immediate cause of the explosion is not known, this finding of the jury has not been impugned. Both defendants were held liable by the judgment of the trial court which was affirmed on appeal. The recovery being for $900 only, a further appeal to this court did not lie without special leave under s.41 of the Supreme Court Act. That leave was granted to the city of St. John by the Appellate Division of the Supreme Court of New Brunswick. The defendant Moses submitted to the judgment against him.

The plaintiff rests his claim against the city on three distinct bases: (a) that the dynamite required for carrying out the contract having been stored by Moses either on property of the city, or on property of which it had a right of occupation by license, its explosion, due to negligence in storing, entailed liability on the city whatever may have been its relationship with Moses;

(b) that in carrying out the work undertaken Moses, if not the servant of the city, was at least by the terms of his contract so much under the control of its engineer that it cannot escape liability on the ground that he was an "independent contractor";

(c) that, if Moses should be regarded as an "independent contractor", the city is nevertheless liable because the work contracted for was of such a character that in the natural course of things injurious consequences to neighbouring property (including that of the plaintiff) must be expected to

arise from its performance unless precautions were taken to prevent such consequences, and the defendant city, therefore, owed a duty to the plaintiff to see that such precautions were taken, responsibility for the discharge of which it could not escape by delegating that duty to a contractor.

(a) Although the evidence should warrant an inference that the shack in which the dynamite was stored was on premises owned or controlled by the municipality, I am not satisfied that its engineer had, or should be deemed to have had, such notice that dynamite was stored in the shack as might entail responsibility apart from the other grounds on which the plaintiff rests his claim. It is unfortunate that these aspects of the case were not more fully investigated at the trial and that we are without the advantage of findings upon them by the jury. If I thought a finding of tacit sanction by the city of the storage of dynamite in the shack justifiable, I should probably be disposed to support the judgment against it on the ground which I understand commends itself to my brother Newcombe.

(b) On this branch of the case the learned trial judge expressed these views: "As to whether, by the terms of the written contract, Moses was in fact an independent contractor, or whether the city corporation retained such control of the work as to create the relationship of master and servant, I have not deemed it necessary to decide, inasmuch as in the circumstances indicated the defence as to the damage complained of being caused by the act of an independent contractor is, in my opinion, of no avail. I feel, however, constrained to say that had it been necessary for me to decide this question, the provisions in the contract and specifications as to the work being carried on under the direction of the city's engineer, and requiring the contractor and his foreman and servants to obey at all times the orders of the engineer, as well as the fact of the city's fixing the scale of wages to be paid by the contractor to his employees, and the provisions requiring him to save the corporation harmless from all suits and actions brought against it by reason of the carrying out of the work, are considerations which, in the absence of the clearest possible authorities to the contrary, I should have found it most difficult to reconcile with the idea of Moses being an independent contractor in the sense contended for."

In delivering the judgment of the Court of Appeal, Hazen C.J., said: "I do not base my judgment on the ground that the relationship of master and servant existed between Moses and the city, but I certainly, like Mr. Justice Crockett, would have great difficulty in coming to the conclusion, in view of the clauses contained in the contract specifications and conditions thereunder, that Moses was an independent contractor. He was to be subject to the control and direction of his employer in respect to the manner in which the work was to be done, and that I think would constitute him a servant of the city, which would therefore be liable for his negligence."

There is no suggestion in the evidence that there had in fact been interference by any civic official in the performance of his contract by Moses. No directions had been given him as to the bringing of dynamite to the work, or as to its storage. Indeed failure to give such instructions is

one of the grounds on which the plaintiff imputes responsibility to the appellant. There is no proof that the presence of dynamite in the shack, or in the neighbourhood of the work, was known to any employee of the city.

The clauses of the contract and specifications relied upon to establish such control by the city as would preclude its plea that Moses was an independant contractor read as follows:

[The Chief Justice then examined the contract which provided inter alia that although all work, labour and materials were to be supplied by the contractor, it should be subject to the approval or rejection of the city engineer and the latter was to have full power and liberty to inspect the various parts of the work at all times, the contractor agreeing to execute all orders or directions that the en-

Wide as are the powers of interference and control thus reserved to the city, their mere existence does not in se suffice to make the contractor and his workmen in carrying out the work contracted for the servants of the city. It may, as Sir Frederick Pollock says (Law of Torts, 12th ed., p. 80-81), sometimes "be a nice question whether a man has let out the whole of a given work to an 'independent contractor' or reserved so much power or control as to leave him answerable for what is done." But in the absence of actual interference by the employer or his representative in exercise of the power thus reserved resulting in the injury for which damages are claimed--here there was none--the authorities seem to be reasonably clear that the mere reservation, to quote Smith's Law of Master and Servant, (7th ed., p. 238): "by contract (of) general rights of watching the progress of works which the contractor has agreed to carry out for him, of deciding as to the quality of the materials and workmanship, of stopping the works or any part thereof at any stage, and of dismissing disobedient or incompetent workmen employed by the contractor will not of necessity render (the employer) liable to third persons for the negligence of the contractor in carrying out the works."

This passage is cited with approval by McCardie J., in Performing Right Society v. Mitchell & Booker. That learned judge says that "the question whether a man is a servant or an independent contractor is often a mixed question of fact and law. If, however, the relationship rests upon a written document only, the question is primarily one of law. The contract is to be construed in the light of the relevant circumstances." He proceeds to discuss the criteria indicated by the authorities for determining whether the relationship of the employed to the employer is that of independent contractor or of servant, and then says that "The final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of the detailed control over the person alleged to be the servant. This circumstance is, of course, only one of several, but it is usually of vital importance." He cites as authority the leading case of Hardaker v. Idle District Council, [1896] 1 Q.B. 335, which has been followed and, so far as I am aware, has never been seriously questioned. The powers of supervision and control of the city engineer in the present case are not wider than those that were reserved to the district council's inspector in the Hardaker case. While the defendants were there held liable on the ground that they could not delegate their duty to provide against injury to the gas mains (escaping gas from which caused damage to the plaintiff) so as to avoid liability for breach thereof, a majority of the Lords Justices (Lindley and

A. L. Smith, L.JJ.) concurred in holding that "large as the inspector's power was, Thornton (the contractor) was not. . . the servant of the defendants (p. 343): the true relation was that of principal and contractor (p. 344)."

I am, with respect, not disposed to regard the relation between the defendants in the present instance as that of master and servant or as other than that of employer and independent contractor.

(c) The doctrine enunciated by Cockburn L.C.J. in Bower v. Peate (1876), 1 Q.B.D. 321, at p. 326, ["A man who orders a work to be executed from which in the natural course of things injurious consequences to his neighbour must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief and cannot relieve himself of his responsibility by employing someone else--whether it be the contractor employed to do the work from which the danger arises or some independent person--to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."] which is made the basis of the plaintiff's claim in the third branch of the case, was doubted by Lord Blackburn in Hughes v. Percival (1883) 8 App.Cas. 443, as possibly too broadly stated; but the learned Lord did not indicate "how far this general language should be qualified." (See observation of A. L. Smith L.J. in Hardaker v. Idle District Council.) Lords Watson and Fitzgerald cited Bower v. Peate, without any suggestion of qualification. Mr. Salmond in his valuable work on Torts (6th ed.), at p. 124, treats Lord Blackburn's expression of doubt as a statement that Sir Alexander Cockburn's general proposition should not be supported. He concludes (p.125) that "the vicarious responsibility of the employers of independent contractors is not the outcome of far-reaching general principle, but represents merely a number of more or less arbitrary exceptions based on considerations of public policy." While it is "a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract [Ellis v. Sheffield Gas Consumers' Company (1853), 2 E. & B. 767, 769,] it is no doubt the general rule that the person who employs an independent contractor to do work in itself lawful and not of a nture likely to involve injurious consequences to others is not responsible for the results of negligence of the contractor or his servants in performing it. The employer is never responsible for what is termed casual or collateral negligence of such a contractor or his workmen in the carrying out of the contract; and it is not universally true that he is responsible for injury occasioned by improper or careless performance of the very work contracted for; he is not so where the work is not intrinsically dangerous and, if executed with due care, would cause no injury, and the carrying out of it in that manner would be deemed to have been the thing contracted for. His vicarious responsibility arises, however, where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to

take such precautions would be indisputable. That duty imposed by law he cannot delegate to another, be he agent, servant or contractor, so as to escape liability for the consequence of failure to discharge it. That, I take it, is a principle applicable in such a situation whatever be the nature otherwise or the locus of the work out of which it arises.

Injuries due to improper acts authorized by the employer, to his negligence in the selection of the contractor, to his failure to impart proper instructions, to his neglect to prevent the creation on his own property by the contractor of a nuisance, or its continuance, or to his giving employment to do acts which, though lawful, can be done only at the peril of him who does them, are really not within the purview of the doctrine imputing vicarious responsibility. In these cases the responsibility is rather direct and rests on personal acts or omissions.

Contracts for works involving interference with rights or support (Dalton v. Angus (1881), 6 App.Cas. 740; Hughes v. Percival, 8 App.Cas.443) and for works entailing the creation of dangers on highways (Penny v. Wimbledon Urban District Council, [1899] 2 Q.B. 72; Holliday v. National Telephone Co., [1899] 2 Q.B. 392), it is well established, subject the employer to vicarious responsibility for negligence on the part of his contractor which is not casual or collateral. The duty to take precautions for protection of the property endangered in the one case, and of the public in the other, cannot be delegated by the employer so as to avoid responsibility. These are admitted exceptions to the general rule giving the employer immunity from responsibility for the acts or omissions of the independent contractor. But the extension of this class of exception to contracts for work of other kinds the carrying out of which, unless precautions be taken to obviate the danger, involves equally manifest risk to those of the public who happen to come, or to possess property, within the region affected by it, is contested.

As early as 1861, however, in Pickard v. Smith, 10 C.B.N.S. 470, at p. 479, Williams J., delivering the judgment of the Court of Common Pleas could find no sound distinction between the case of a public highway and of a road which may be, and to the knowledge of the wrongdoer will in fact be, used by persons lawfully entitled to do so. In Black v. Christ Church Finance Co., [1894] A.C. 48, at p. 54, vicarious responsibility of the employer for negligence in the setting out of fire on open bush land, "an operation necessarily attended with great danger", was upheld by the Privy Council. The employer could not delegate his duty to take all reasonable precautions to prevent the fire spreading so as to escape responsibility for their being neglected. In Odell v. Cleveland House, Limited (1910), 102 L.T. 602, the same doctrine was applied to a case of employment of a contractor to demolish the upper portion of a building, and the statement of law by Cockburn, L.C.J., in Bower v. Peate (1876), 1 Q.B.D. 321, was made the basis of the judgment. In Hardaker v. Idle District Council, while the contract was for work on a highway, the injury was to persons and property in an adjacent house. In this latter case the liability of the employer was rested upon the principle stated by Lord Blackburn in Dalton v. Angus, 6 App. Cas. 740, at p. 829, that "a person causing something to be done the doing of which casts upon him a duty, cannot escape from the responsibility

attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with a contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby release himself from liability to those injured by the failure to perform it"; Lord Watson, at p. 831, said: "In cases where the work is necessarily attended with risk he (the employer) cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is thereby liable, as well as the contractor, to repair any damage which may be done.

It is true these noble Lords were immediately dealing with a case of interference with a right to support; but they are, in these passages, as I read them, stating a principle of general application; and that principle, I think, governs the determination of the present case.

The work here contracted for was rock excavation necessarily requiring, for economic reasons, the use of a high explosive. Convenience, amounting to practical necessity, demanded that a reasonable quantity of the explosive should be readily accessible. That in turn involved its being stored upon, or adjacent to, the site of the work, and in dangerous proximity to neighbouring buildings, one of which was that owned by the plaintiff. The dynamite was accordingly brought to Moses to, and stored in, the toolhouse. It was there solely for the purpose of his contract with the city. In so storing it he was acting under that contract, though improperly. Black v. Christchurch Finance Co. Had the city carried on the work by day labour its legal duty to see that its servants safely stored the dynamite required and its liability for injurious consequences resulting from improper and dangerous storage of it would admit of no doubt. The danger to persons using the highway and to adjacent properties from improper storage of such an explosive must have been obvious to any thinking person. The employer ordering work involving storage of dynamite near a highway and neighbouring houses, was, at his peril, bound to see that the duty of taking preventive precautions against its manifest danger producing injurious consequences was performed. The most obvious of such precautions was to provide for the dynamite the safest storage possible. Compare Wetherbee v. Partridge (1900), 175 Mass. 185.

If an obligation was imposed on the city, as employer, to exact a proper contractual stipulation or to give proper instructions as to the storing of the explosive, that duty was entirely neglected. (Robinson v. Bonconsfield Rural District Council, [1911] 2 Ch. 188). But the city's duty to see that proper storage for the dynamite was provided would not be satisfied by merely stipulating or giving instructions for it. Failure to see that the duty was performed entailed liability on it as employer to those injured as a result of its non-performance. As put by Lord Lindley in Hardaker v. Idle District Council, the case is not one in which the contractor performed the city's duty for them, but did so carelessly; the case is one in which, so far as the providing of a proper place for storing the dynamite was concerned, no effort was made to discharge the duty of the city.

Nor can the improper storage of the dynamite be regarded as casual or collateral negligence on the part of Moses. It was negligence in the performance of an essential part of the work which he was employed to do--in the discharge of the very duty (amongst others) which the law would have thrown upon the city had it been acting by the hands of its servants. Hardaker v. Idle District Council, per Rigby L.J.; Robinson v. Beaconsfield Rural District Council. Moses expressly agreed to provide and by implication to care for, all necessary material. The dynamite required for the work was part of such material, and its storage at a point reasonably accessible for the men engaged in the work was one of the obligations which Moses impliedly undertook. Improper storage was not such an act of negligence as could not have been anticipated and guarded against; Penny v. Wimbledon Urban District Council, [1899] 2 Q.B. 72, at p. 78; Pearson v. Cox (1877), 2 C.P.D. 369; and carelessness in the storage and handling of explosives is not something so unusual that no sane contractor might be expected to be guilty of it. Hughes v. Percival.

Storing the dynamite was an integral part of the work contracted for which was necessarily attended with danger, unless the precaution of providing a suitable place to keep it in was observed. The palpable recklessness of Moses in putting it in a building used as a tool-house and occupied as a forge involved the city in responsibility.

Appeal dismissed with costs.

[The opinions of Duff, Mignault, Newcombe and Rinfret, JJ. are omitted. Newcombe J. based his judgment on the ground that it was the duty of the city to see that explosives kept on their own property or property under their control did not cause a nuisance.]

[In the Hardaker case referred to by Anglin C.J.C., Rigby L.J. defines "collateral negligence" as "negligence other than the imperfect or improper performance of the work which the contractor is employed to do."

SALSBURY v. WOODLAND [1969] 3 All E.R. 863 (C.A.)

WIDGERY, L.J., read the first judgment at the invitation of HARMAN, L.J. This is an appeal from a judgment of PAULL, J., given on 1st July 1968 whereby he awarded to the plaintiff, Mr. Michael Salsbury, damages totalling £6,500 against all three defendants, in respect of personal injury which the plaintiff had suffered in somewhat remarkable circumstances. The accident to the plaintiff occurred on 5th July 1963 in a road called Dome Hill, at Caterham in Surrey. The first defendant, Mr. Woodland, had recently bought a house, no. 11 Dome Hill, but had not at this point moved into occupation of it. The garden was somewhat overgrown and it is evident that the first defendant and his wife were minded to have the garden tidied up before they went in. Amongst other duties to be done was the felling of a large hawthorn tree which stood in the front garden and had grown to a height of some 25 feet or more. An agreed plan shows the location of the hawthorn tree; and the following dimensions are perhaps of some consequence. The distance from the public footpath back to the nearest portion of the house was some 40 feet, seven inches. The hawthorn tree stood at the side of the drive 12 feet, seven inches from the house and 28 feet from the road. Running diagonally across the garden was a telephone wire (it was in fact a pair of telephone wires in those days) serving the house. These wires were attached to a telegraph pole on the side of Dome Hill remote from the house and ran across, unsupported, until they reached the eaves of the house at the western end—that is to say the end of the house on the left-hand side of the plan. They were there attached to insulators and they came down to the instrument in the house. The height of the tree was such that if it was allowed to fall in the direction in which the telephone wires ran one or more of its branches would foul the telephone line. The first defendant appreciated that the felling of this tree was not a job for an amateur like himself, and his wife was considering how expert assistance might be acquired. Some days before 5th July she had seen in an adjacent road a party of men felling trees. She asked the foreman whether one of his men would come and take down this hawthorn tree for her. The foreman said that he would enquire and next day told the first defendant's wife that a Mr. Coombe, the second defendant, was prepared to do this work. The first defendant's wife, quite properly, accepted the second defendant as a man of competence and experience appropriate for the job.

To cut the story to its briefest terms, the second defendant reached the stage of felling this tree on the evening of 5th July at about 5.0 p.m. He had been told that no stump was to be left. That involved bringing up the roots as well. Having lopped the tree to some extent but not so as significantly to affect its total height, he then dug a trench round the bole of the tree, severed some of the roots, and proceeded by means of a tractor to push and pull the tree with a view to loosening it and causing it to fall.

He was being watched with interest and some apprehension by the first defendant's wife, who feared that the tree might damage the house. He was also being watched out of curiosity by a Mr. Sherwood, aged 21, the son of the house next door, no. 13 Dome Hill, and the plaintiff, who was also aged 21, and who was a friend of Mr. Sherwood's and had happened to call at this time.

The second defendant proceeded with his operation, and eventually the tree came down. It seems clear that his method of removing the stump was one which gave him no real control over the direction in which the tree should fall, and as luck would have it it fell towards the telephone wires, and at least one long branch, not less than 25 feet in length, fouled the telephone wires and broke them. One wire was severed at the eaves of the house itself; the other was severed some 18 feet away from the terminal point on the eaves. Both wires remained attached to the top of the telephone pole on the remote side of the road, and the wires thus described a kind of parabola across the road: one wire came down almost vertically and then, as it was said, "snaked" across the road, in the manner which was described, touching the road from point to point; the other wire came down in a large, flatter curve, so that in the centre of the carriageway it was two feet above the level of the carriageway.

The plaintiff, and Mr. Sherwood, observing that this had happened, decided that something must be done. Their plan seems to have been that Mr. Sherwood would go back into his house and telephone the G.P.O. and the plaintiff would coil up the broken wires and remove the hazard on the highway which they could create. Unfortunately, before the plaintiff had any opportunity to begin to coil the wires at all, a motor car appeared from the direction of Caterham, driven by Mr. Waugh, the third defendant. This was a Mini car, which was being driven up the road at a speed found by the judge to have been 45 to 50 m.p.h. and accelerating. The speed was criticised in the course of the trial, but the judge found, and I have no doubt rightly, that in the circumstances 45 to 50 m.p.h. was not an unreasonable speed.

The plaintiff appreciated that the car might come into collision with the wires across the road. His immediate reaction was to signal the driver to slow down, but it was too late to do that, and the plaintiff realised—in a manner which is not criticised in the judgment—that a collision between the car and the wires was inevitable and that the result on the wires might be injurious to him because they were close to him, and their behaviour after the collision was no doubt unpredictable. Just at about the time the car struck the wires, the plaintiff, for his own safety, fell face downwards on the grass verge. He seems to have used his hands to break his fall. For a man of 21 to fall in that way on a grass verge is not an incident likely to give rise to any injury, but unfortunately a further coincidence is that the plaintiff had a defect in his back. The details of this defect were fully investigated at the trial and I find it unnecessary to go into them now. Putting it in simple, layman's terms, he had in his spine what is called an angioma, which I gather is a kind of small tumour. The effect of this relatively unathletic exercise of falling on his face clearly disturbed the angioma, causing it to bleed, and the result of this on the adjacent spinal cord was to give the plaintiff within two or three days all the symptoms of paraplegia: in other words, both legs went numb below the waist and at one time it looked as though very grave injury had been caused. Happily things did not turn out as badly as that; the plaintiff achieved a measure of recovery; but the extent of his resultant permanent injury is measured by the fact that the learned judge thought it right to award him £5,000 for general damages.

At the trial, as is understandable, many difficult questions of causation and foreseeability were considered. The case against the three defendants, in a nutshell, was this. It was said that the second defendant (the tree-feller) had been negligent in felling the tree and that that negligence was the cause of foreseeable injury to the plaintiff. It was said, and was found by the learned judge, that the first defendant was liable for that injury because in the circumstances of this case the judge held that he was liable for the negligence of the second defendant. Thirdly, it was said that the third defendant was negligent in that when driving up the road he either saw the telephone wires and failed to take evasive action or alternatively was negligent in that he ought to have seen the telephone wires and ought again to have taken evasive action but failed to do so.

Any question of causation resulting from the negligence of the third defendant is a matter which does not arise in this appeal and I am therefore spared the necessity of going into it in any detail. So far as the second defendant is concerned, judgment was obtained against him, I think in default of defence. No issue of his liability was raised here. The appeals of the first and third defendants respectively raise quite different questions and therefore they can conveniently be dealt with separately.

So far as the first defendant is concerned, he personally committed no negligent act, and it is not challenged that in selecting the second defendant as the means of having this tree felled he selected a person who was apparently competent and fit to do it. The whole basis of the case against the first defendant is that the second defendant was negligent and that the first defendant is responsible for that

negligence. Counsel for the first defendant, was prepared to challenge the judge's finding of negligence on the part of the second defendant, and was prepared to challenge the difficult questions of causation which arose in the course of that issue, but, the court having concluded that the first defendant's appeal succeeded on a different ground, I need not go into those matters now. The basis of the decision of this court (which has already been indicated to the parties) on the liability of the first defendant is simply that the first defendant was not responsible for the negligence of the second defendant even if the second defendant was negligent; and it is to that matter only that I need now direct myself.

It is, of course, trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think it is entirely accepted that those cases—and there are some—in which an employer has been held liable for injury done by the negligence of an independent contractor are in truth cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf. The whole question in this case is whether, in the circumstances which I have briefly outlined, the first defendant is to be judged by the general rule, which would result in no liability, or whether he comes within one of the somewhat special exceptions—cases in which a direct duty to see that care is taken rests on the employer throughout the operation.

This is clear from authority; and for convenience I take from SALMOND ON TORTS (14th Edn.) at p. 687, this statement of principle:

> "One thing can, however, be said with confidence: the mere fact that the work entrusted to the contractor is of a character which may cause damage to others unless precautions are taken is not sufficient to impose liability on the employer. There are few operations entrusted to an agent which are not capable, if due precautions are not observed, of being sources of danger and mischief to others; and if the principal was responsible for this reason alone, the distinction between servants and independent contractors would be practically eliminated from the law."

I am satisfied that that statement is supported by authority and I adopt it for the purposes of this judgment.

One can compare at once that statement with the statement of principle on which the learned judge himself relied. In his judgment, having referred to some of the considerations to which I have myself already referred, he said this:

> "The principal, unlike the employer, is not liable for incidental acts of negligence during the work; for instance, dropping a hammer on someone's head; but he is liable if the very act he orders to be done contains in it a risk of injury to others, and someone is injured as a result of the contractor's negligence as a consequence of that risk. In this case [he means the instant case] there can be no doubt that there was an inherent risk of injury to others when the tree was felled unless proper care was taken to get rid of the risk."

I make two observations on those words of the learned judge. First of all, the evidence makes it perfectly clear that this tree could be felled by a competent man, using proper care, without any risk of injury to anyone. The undisputed evidence of an expert was that the proper way to fell this tree, in its confined situation, was to lop the branches respectively until there was left a stump of only eight to ten feet in height. All that could be done without any danger to anyone, if at any rate all appropriate precautions were taken, and the resultant stump eight to ten feet high could then have been winched out of the ground, again without risk to anyone. So when the learned judge referred to this being an operation in which "there was an inherent risk", in my respectful view he is putting the matter too high. If he meant that there was a risk which even due care could not avoid he was, in my judgment, quite wrong on the undisputed evidence that was before him.

Secondly, I would venture to criticise the statement of principle which the learned judge has applied as being too wide. Taken literally, it would mean that the fare who hired a taxicab to drive him down the Strand would be responsible for negligence of the driver en route, because the negligence would be negligence in the very thing which the contractor had been employed to do. No one is disposed to suggest that the liability of the employer is that high; and although the learned judge re-inforced himself by certain observations of ROMER, L.J., in *Penny* v. *Wimbledon Urban Council* (1), in my opinion the test which he applied was far too stringent.

In truth, according to the authorities there are a number of well-determined classes of case in which this direct and primary duty on an employer to see that care is taken exists. Two such classes are directly relevant for consideration in this case. The first class concerns what have sometimes been described as "extra

hazardous acts"—acts commissioned by an employer which are so hazardous in their character that the law has thought it proper to impose this direct obligation on the employer to see that care is taken. An example of such a case is *Honeywill and Stein, Ltd.* v. *Larkin Bros. (London's Commercial Photographers), Ltd.* (2). Other cases which one finds in the books are cases where the activity commissioned by the employer is the keeping of dangerous things, within the rule in *Rylands* v. *Fletcher* (3), and where liability is not dependent on negligence at all.

I do not propose to add to the wealth of authority on this topic by attempting further to define the meaning of "extra hazardous acts"; but I am confident that the act commissioned in the present case cannot come within that category. The act commissioned in the present case, if done with ordinary elementary caution by skilled men, presented no hazard to anyone at all.

The second class of case which is relevant for consideration of the present dispute concerns dangers created in a highway. There are a number of cases on this branch of the law, a good example of which is *Holliday* v. *National Telephone Co.* (4). These, on analysis, will all be found to be cases where work was being done in a highway and was work of a character which would have been a nuisance unless authorised by statute. It will be found in all these cases that the statutory powers under which the employer commissioned the work were statutory powers which left on the employer a duty to see that due care was taken in the carrying out of the work, for the protection of those who passed on the highway. In accordance with principle, an employer subject to such a direct and personal duty cannot excuse himself if things go wrong merely because the direct cause of the injury was the act of the independent contractor.

This again is not a case in that class. It is not a case in that class because in the instant case no question of doing work in the highway, which might amount to a nuisance if due care was not taken, arises. In my judgment, the present case is clearly outside the well-defined limit of the second class to which I have referred. Counsel for the plaintiff accordingly invited us to say that there is a third class into which the instant case precisely falls and he suggested that the third class comprised those cases where an employer commissions work to be done *near* a highway in circumstances in which, if due care is not taken, injury to passers-by on the highway may be caused. If that be a third class of case to which the principle of liability of the employer applies, no doubt the present facts would come within the description. The question is, is there such a third class?

Reliance is placed primarily on three authorities. The first is *Holliday's* case (4), to which I have already referred. *Holliday's* case (4) was a case of work being done in a highway by undertakers laying telephone wires. The injury was caused by the negligent act of a servant of the independent contractor who was soldering joints in the telephone wires. The cause of the injury was the immersion of a defective blow-lamp in a pot of solder, and the pot of solder was physically on the highway—according to the report, on the footpath. The EARL OF HALSBURY, L.C., holding the employers responsible for that negligence, in my view, on a simple application of the cases applicable to highway nuisance to which I have already referred, put his opinion in these words (5):

> "Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place."

Counsel for the plaintiff draws our attention to the phrase "in proximity to a highway" and submits that that supports his contention on this point. I am not impressed by this argument, because the source of danger in *Holliday's* case (4) was itself on the highway and also because I do not think it follows (although one need not decide the point today) that in the true highway cases to which I have referred the actual source of injury must arise on the highway itself. Counsel for the plaintiff said that in *Holliday's* case (6) it would have been ridiculous if there had been liability because the pot of solder was on the highway but no liability if it was two feet off the highway. That is an observation with which I entirely sympathise; but I can find nothing in LORD HALSBURY'S use of the word "proximity" to justify the view that there is therefore a special class of case on the lines submitted by counsel.

The second case relied on is *Tarry* v. *Ashton* (7), where a building adjoining the highway had attached to it a heavy lamp which was suspended over the footway and which was liable to be a source of injury to passers-by if allowed to fall into disrepair. It fell into disrepair, and injury was caused. The defendant sought to excuse himself by saying that he had employed a competent independent contractor to put the lamp into good repair and that the cause of the injury was the fault of the independent contractor. Counsel for the plaintiff argues that that case illustrates the special sympathy which with the law regards passers-by on the highway. He says this demonstrates that the law has always been inclined to give special protection to persons in that category and so supports his argument

that any action adjacent to the highway may be subject to special rights. But in my judgment that is not so. *Tarry* v. *Ashton* (7) seems to me to be a perfectly ordinary and straightforward example of a case where the employer was under a positive and continuing duty to see that the lamp was kept in repair. That duty was imposed on him before the contractor came and after the contractor had gone; and on the principle that such a duty cannot be delegated the responsibility of the employer in that case seems to me to be fully demonstrated. I cannot find that it produces on a side-wind, as it were, anything in support of counsel for the plaintiff's contention.

The last case to which I will refer on this point is *Walsh* v. *Holst & Co., Ltd.* (8), a decision of this court. In that case the occupier of premises adjoining the highway was carrying out works of reconstruction which involved knocking out large areas of the front wall. He employed for this purpose a contractor, and the contractor employed a sub-contractor. It was obvious to all, no doubt, that such an operation was liable to cause injury to passers-by by falling bricks unless special precautions against that eventuality were taken. Indeed very considerable precautions were so taken. However, on a day when the only workman employed was an employee of the sub-contractor one brick escaped the protective net, fell in the street and injured a passer-by. The passer-by-plaintiff brought his action against the occupier, the contractor, and the sub-contractor, relying on the doctrine of res ipsa loquitur. In my judgment, the only thing that was really decided by that case was that on those facts the precautions which had been taken against such an injury rebutted the presumption of negligence which might otherwise have arisen under the doctrine of res ipsa loquitur. No attempt appears to have been made in argument to distinguish the liability of the occupier as compared with that of the contractor or sub-contractor, and it certainly was not material to the decision; but counsel for the plaintiff relies on it for dicta which unquestionably are helpful to him. He referred first to the judgment of HODSON, L.J., who, having stated the doctrine of res ipsa loquitur, went on to deal with the relevant positions of the parties. He said (9):

> "So far as the occupiers are concerned, the law as stated in *Penny* v. *Wimbledon Urban Council* (10) is applicable: 'When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions'."

Then HODSON, L.J., observes that no question of collateral negligence arose in the instant case and accepts the proposition, without further enquiry, that if negligence were established each of the defendants would be liable.

SELLERS, L.J., touched on the same point. He said (11):

> "As the occupiers had authorised work to be done adjoining the highway which might without due precautions cause injury to anyone on the highway, the authorities already cited by my Lords show that the occupiers would be liable for the negligence of the contractors or sub-contractors in failing to take due precautions. Likewise the contractors would be liable for any negligence in the performance of their duties delegated to sub-contractors."

Counsel for the plaintiff says, with force, that if that be the law then he needs no more in this case; but in my judgment, having considered this matter with such care as I can, I can find nothing in the authorities to which SELLERS, L.J., referred which justifies a conclusion in the terms which he uses; and, as I have already said, this decision was obiter because the case turned on the absence of negligence and not on any nice question of which of the defendants might have been liable if negligence had been proved.

Accordingly, in my judgment, there is no third class of cases of the kind put forward by counsel for the plaintiff; and it was for those reasons that I concurred in the court's decision, already announced, that the appeal of the first defendant should be allowed and the judgment against him set aside.

I turn now to the position of the third defendant. It was submitted before the learned judge that the negligence of the third defendant consisted in his driving up to the wires which were draped across the road and failing to stop or slow down when he either had seen them or should have seen them. The vital question, in my judgment, was whether it was right to say that he ought to have seen them—whether any careful motorist in his position would see them.

To assist the learned judge in reaching a conclusion he had a plan of the road and he had some very good photographs, particularly those which show the nature of the road most vividly and show amongst other things that the surface was of untreated concrete and therefore light in colour. The photographs also show that the area is a wooded area and that the sides of the road are heavily wooded right up to the footpath. In addition, albeit at a rather late stage of the trial, the learned judge was shown a sample of the wire in question; and of course he had had a full description in the evidence of how the wires were draped across the road. It was really, as I see it, for him to conclude from those factors whether he could say that any careful motorist would have seen the wires in time to slow up and avoid an accident.

As regards oral evidence on this issue, namely, whether the wires were capable of being seen by a careful motorist, a number of witnesses were asked for their views on the matter; but I find the result quite inconclusive. The third defendant's case was that he knew nothing about the accident at all, and naturally he was not able to give any evidence whether he could have seen the wires. Questions were put to him on a hypothetical basis and he was asked whether he thought he would have seen the wires; but I find his answers of no value at all—nor indeed did the learned judge. Equally, Mr. Sherwood and the plaintiff were asked whether they thought the motorist ought to have been able to see the wires, and they gave (as is to be expected) cautious answers, sometimes saying they thought perhaps he would and sometimes they thought perhaps he would not. Nothing turns on that, in my judgment, because in the end the learned judge had to decide for himself whether he thought, having seen the wire and having had the locus described to him, the wire ought to have been seen by the motorist. It is quite clear that in the early part of the trial the judge was inclined to think that the wire could be seen; but when the specimen of wire was put before him the transcript makes it clear that he had considerable doubts on the subject, and I understand the doubts, because when one looks at the wire at close hand it is of very narrow gauge and I fully appreciate the impression which was made on the learned judge when he saw it.

The learned judge then canvassed the possibility of having a view. At one time he thought that he might be helped if he had a view and if wires of similar gauge were draped across the road. There was a somewhat inconclusive exchange between judge and counsel as to the possibility of arranging such a view. In the end the matter seems to have been left, when the judge reserved judgment, that if he wanted a view with a demonstration of the wire he would ask for it; and then, almost as an afterthought, in the last sentence that he uttered he said that perhaps he would have a look at the place himself. In fact he did; he went down in his car, he tells us in his judgment, and saw the scene from the viewpoint of the third defendant. No attempt was made to arrange a demonstration with wires draped on the road, but the judge was able to see a pair of telephone wires of the appropriate kind which still ran from the telephone post to no. 15 Dome Hill.

The view made a considerable impression on the judge. In his judgment he said:

> "I want to say that I have been to the site in my car without any representative of any of the parties being present, approaching the house from the same direction as the third defendant was approaching it at the time of the accident. I bring this fact in at this stage in my judgment as I must confess it somewhat altered my conception as to the garden in which the hawthorn tree grew"

and then he went on to deal with the evidence of the dimensions of the garden. It is quite evident that those dimensions which had been put before him in evidence had not given him the same picture of the relevant positions of the tree and the telephone wires which his eye gave him when he went to see the site. But more important is his conclusion about what the third defendant could have seen. He said:

> "The actual telephone wire was not produced until nearly the end of the case. Various witnesses had given evidence as to whether they thought the actual wire ought to have been seen; this was before the wire was produced. Although I allowed such evidence to be given, I confess I did not pay much attention to what others thought; I essentially had to make up my own mind on the matter. When the wire was produced it was certainly a great deal thinner than I had expected and I began to wonder very seriously whether wire of that thickness could reasonably be seen, when draped across the road, in sufficient time to slow down or stop even although there were two wires in the positions I have indicated. So much in a case of this sort depends on such factors as the nature of the surroundings and the colour of the road itself. It was because of this that I finally determined that I ought to accept the invitation to see the road for myself. Having seen the road, the surroundings, and the telephone wires of exactly the same type stretching across the particular highway from the pole to house no. 15, I feel I am in a better position than I was to make up my mind on that point."

He then went on to point out that he realised that the lighting and cloud-cover might have been different on the day of the accident; and he said:

> "I should make it clear that before I myself saw the scene I was inclined to think that a reasonable driver driving at a reasonable speed might not

> have seen the wire at all until at any rate he was too near to pull up. I am satisfied, having seen the scene, that the moment the plaintiff saw him accelerating in such a way that he realised there would be danger from the whipping of the wire [the third defendant] ought already to have seen, even if he had not actually seen, the wire and to have taken steps to make it apparent that he was slowing down to the point where there was no danger from the wire."

It is crystal-clear that the learned judge's conclusions on this question of negligence were largely dependent on the impression which his view had made on him. In those circumstances counsel for the third defendant submitted that the judgment against his client should be set aside, for two main reasons. First he contended that the view was an irregular view, that it vitiates the judgment, and that this court should order a new trial accordingly. Alternatively he submitted that even if the view is regarded by this court as regular, yet on the evidence as a whole, including the view, a judgment in favour of the third defendant should have been entered.

I take those two points individually. As regards the judge's power to have a view, there is authority for this in R.S.C., Ord. 35, r. 8 (1) which provides:

> "The judge by whom any cause or matter is tried may inspect any place or thing with respect to which any question arises in the cause or matter."

The rule is in those general terms.

The circumstances in which a view should be held are the subject of directions in *Goold* v. *Evans & Co.* (12), a decision of this court. I refer to the judgment of DENNING, L.J., which is in these terms (13):

> "It is a fundamental principle of our law that a judge must act on the evidence before him and not on outside information; and, further, the evidence on which he acts must be given in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. Speaking for myself, I think that a view is part of the evidence, just as much as an exhibit. It is real evidence. The tribunal sees the real thing instead of having a drawing or a photograph of it. But, even if a view is not evidence, the same principles apply. The judge must make his view in the presence of both parties, or, at any rate, each party must be given an opportunity of being present. The only exception is when a judge goes by himself to see some public place, such as the site of a road accident, with neither party present."

I respectfully adopt those observations as being the correct approach to this question. I would also say in general that a view is something which should be conducted by the judge by appointment, in the presence of representatives of both sides. However, the expression "view" is used indifferently to describe two very different things. Sometimes it refers to what DENNING, L.J., spoke of as a judge going to see some public place, where all that is involved is the presence of the judge using his eyes to see in three dimensions and true colour something which had previously been represented to him in plan and photograph. The other way in which the word "view" is frequently used is to describe some kind of demonstration in which the events of the accident are reconstructed or simulated; and in my judgment it would be exceedingly dangerous for a judge to attend anything which could be described as a demonstration except in strict accordance with the principles laid down by DENNING, L.J.—in the presence of representatives of both sides. Different considerations apply to a "view" in the true meaning of the word, where all that is required is that the judge should go to the place to see what it looks like, he having been already given in evidence the available assistance in the form of photographs and a plan, which all judges are given. A view of that kind is constantly held by a judge by himself without reference to parties at all. It is a commonplace for a judge on circuit to find it convenient to see the locus of a road accident in respect of which he is trying a case at the assizes; and it appears from *Hare* v. *British Transport Commission* (14) that no less an authority than LORD GODDARD, C.J., had an unaccompanied view of platform 13 at Euston Station, and he clearly thought there was nothing wrong or irregular in what he was doing. In my judgment, a judge who intends to have a "private" view, if one may so describe it, is well advised to tell the parties he is going to do so. This enables them to warn him if there has been some change in the local surroundings which might otherwise mislead him. If he chooses to go by himself and in fact is not subject, through any cause, to being misled by a change in surroundings, I can see nothing wrong in it, and indeed I would think it regrettable if this important facility were withdrawn from a judge in appropriate cases.

I have been troubled in the present case whether there was not something special here, because for some time I was disturbed that the judge should have

reached such a conclusive decision in his mind as a result of the view. I thought at one time that he must have seen something which we do not know about and which may have influenced his mind. But in the end, having considered it carefully, I have come to the conclusion that this is an ordinary case and that the mere fact that the view was helpful to the judge is not a reason for saying it was irregular. I have come to the conclusion that this is an ordinary case in which the judge was helped by the view, that it did cure some misconception which his mental picture of the locus had conjured up, and I see nothing wrong with it. So much for that point.

Finally, there is the question whether the judgment ought nevertheless to be set aside as being against the weight of evidence. Here, speaking for myself, my mind has worked along much the same lines as the learned judge. When I looked at the specimen of wire and tried to visualise the third defendant driving down this road at 45 to 50 m.p.h., I found it very difficult to say that a careful driver in that situation would have seen this wire in time to take evasive action; and that, as I have already indicated, was the view that the judge seems to have reached at the close of the hearing. If I felt that in this the judge had no advantage which we do not enjoy and that I was able to consider the matter equally as well informed as he, I might well have had considerable difficulty in saying that his judgment on this point should be upheld. But of course he had an advantage which we do not enjoy, in this view to which I have referred. It is quite clear that that view made a great difference to him. For all I know it would have made a great difference to me. In those circumstances I do not feel able to say that this is a case in which we are as well able to assess the matter as was the judge, and thus to form our own view.

After anxious consideration I have come to the conclusion that the appeal of the third defendant, should be dismissed.

(1) [1899] 2 Q.B. 72 at p. 78; [1895-99] All E.R. Rep. 204 at p. 209.
(2) [1934] 1 K.B. 191; [1933] All E.R. Rep. 77.
(3) (1868), L.R. 3 H.L. 330; [1861-73] All E.R. Rep. 1.
(4) [1899] 2 Q.B. 392; [1895-99] All E.R. Rep. 359.
(5) [1899] 2 Q.B. at p. 399; [1895-99] All E.R. Rep. at p. 361.
(6) [1899] 2 Q.B. 392; [1895-99] All E.R. Rep. 359.
(7) (1876), 1 Q.B.D. 314; [1874-80] All E.R. Rep. 738.
(8) [1958] 3 All E.R. 33; [1958] 1 W.L.R. 800.
(9) [1958] 3 All E.R. at p. 36; [1958] 1 W.L.R. at p. 804.
(10) [1899] 2 Q.B. at p. 78; [1895-99] All E.R. Rep. at p. 209.
(11) [1958] 3 All E.R. at p. 41; [1958] 1 W.L.R. at p. 812.
(12) [1951] 2 T.L.R. 1189.
(13) [1951] 2 T.L.R. at p. 1191.

Chapter V: Bond for an Alternative?

Workmen's Compensation Act, R.S.O. 1970, c. 505

COMPENSATION

3.—(1) Where in any employment, to which this Part applies, personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer is liable to provide or to pay compensation in the manner and to the extent hereinafter mentioned, except where the injury,

(*a*) does not disable the workman beyond the day of accident from earning full wages at the work at which he was employed; or

(*b*) is attributable solely to the serious and wilful misconduct of the workman unless the injury results in death or serious disablement. R.S.O. 1960, c. 437, s. 3 (1); 1968, c. 143, s. 2 (1).

Presumptions

(2) Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment and, where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment. R.S.O. 1960, c. 437, s. 3 (2).

When compensation to date from

(3) Compensation for disability shall be computed and payable from and including the day following the day of the accident or from the date of the disability, whichever is the later. 1968, c. 143, s. 2 (2).

Employers liable to contribute to the accident fund

4. Employers in the industries for the time being included in Schedule 1 are liable to contribute to the accident fund as hereinafter provided, but are not liable individually to pay compensation. R.S.O. 1960, c. 437, s. 4.

(Schedule 1 includes 25 classes, for example:-

Class 1 - lumbering
Class 2 - saw-mills
Class 3 - furniture makers
Class 5 - mining
Class 6 - gravel pits
Class 7 - gem metal manufacturing
Class 25 - hospitals and offices)

Employers individually liable

5. Employers in the industries for the time being included in Schedule 2 are liable individually to pay compensation and medical aid. R.S.O. 1960, c. 437, s. 5.

(Schedule 2 includes railways and public utilities)

No action to be brought to recover compensation

12. No action lies for the recovery of compensation whether it is payable by the employer individually or out of the accident fund, but all claims for compensation shall be heard and determined by the Board. R.S.O. 1960, c. 437, s. 13.

Provisions of Act in lieu of all rights of action against employer

14. The provisions of this Part are in lieu of all rights and rights of action, statutory or otherwise, to which a workman or the members of his family are or may be entitled against the employer of such workman for or by reason of any accident happening to him or any industrial disease contracted by him on or after the 1st day of January, 1915, while in the employment of such employer, and no action lies in respect thereof. R.S.O. 1960, c. 437, s. 15.

Right to compensation may not be waived

16. It is not competent for a workman to agree with his employer to waive or to forego any of the benefits to which he or his dependants are or may become entitled under this Part and every agreement to that end is void. R.S.O. 1960, c. 437, s. 17.

Deduction not to be made from wages

18.—(1) It is not lawful for an employer, either directly or indirectly, to deduct from the wages of any of his workmen any part of any sum that the employer is or may become liable to pay to the workman as compensation under this Part or to require or to permit any of his workmen to contribute in any manner towards indemnifying the employer against any liability that he has incurred or may incur under this Part.

Offence

(2) Every person who contravenes any of the provisions of subsection 1 is guilty of an offence and for every such contravention is on summary conviction liable to a fine of not more than $50 and is also liable to repay to the workman any sum that has been so deducted from his wages or that he has been required or permitted to pay in contravention of subsection 1. R.S.O. 1960, c. 437, s. 19.

REHABILITATION

Aid to injured workmen

83. To aid in getting injured workmen back to work and to assist in lessening or removing any handicap resulting from their injuries, the Board may take such measures and make such expenditures as it may deem necessary or expedient, and the expense thereof shall be borne, in Schedule 1 cases, out of the accident fund and, in Schedule 2 cases, by the employer individually, and may be collected in the same manner as compensation or expenses of administration. 1968, c. 143, s. 14.

ACCIDENT FUND

How accident fund to be provided

82.—(1) An accident fund shall be provided by contributions to be made by the employers in the classes or groups of industries for the time being included in Schedule 1, and compensation payable in respect of accidents that happen in any industry included in any of such classes or groups shall be paid out of the accident fund.

Industries in Schedule 2 not to contribute

(2) Notwithstanding the generality of the description of the classes for the time being included in Schedule 1, none of the industries included in Schedule 2 shall form part of or be deemed to be included in any of such classes, unless it is added to Schedule 1 by the Board under this Part. R.S.O. 1960, c. 437, s. 82.

Sufficiency of accident fund to be maintained

84. It is the duty of the Board at all times to maintain the accident fund so that with the reserves, exclusive of the special reserve, it will be sufficient to meet all the payments to be made out of the fund in respect of compensation as they become payable and so as not unduly or unfairly to burden the employers in any class in future years with payments that are to be made in those years in respect of accidents that have happened previously. R.S.O. 1960, c. 437, s. 84.

Regulations re Schedules 1 and 2

86.—(1) Subject to the approval of the Lieutenant Governor in Council, the Board may by regulation,

(*a*) rearrange any of the classes for the time being included in Schedule 1, and withdraw from any class any industry included in it and transfer it wholly or partly to any other class or form it into a separate class, or exclude it from the operation of this Part;

(*b*) establish other classes including any of the industries that are for the time being included in Schedule 2, or are not included in any of the classes in Schedule 1;

(*c*) add to any of the classes for the time being included in Schedule 1 any industry that is not included in any of such classes;

(*d*) exclude any trade, employment, occupation, calling, avocation or service from any industry for the time being included under this Part or at any time brought under this Part.

Apportionment of burden of assessment to hazard of business, etc.

(2) Where in the opinion of the Board the hazard to workmen in any of the industries embraced in a class is less than that in another or others of such industries, or where for any other reason it is deemed proper to do so, the Board may subdivide the class into subclasses or groups and, if that is done, the Board may fix the percentages or proportions of the contributions to the accident fund that are to be payable by the employers in each subclass or group.

Separate accounts to be kept for each class, subclass or group

(3) Separate accounts shall be kept of the amounts collected and expended in respect of every class, subclass or group, but for the purpose of paying compensation the accident fund shall, nevertheless, be deemed one and indivisible.

Power to increase amount of assessment in certain cases

(4) Where in the opinion of the Board sufficient precautions have not been taken for the prevention of accidents to workmen in the employment of an employer or where the working conditions are not safe for workmen or where the employer has not complied with the regulations respecting first aid, the Board may add to the amount of any contribution to the accident fund for which the employer is liable such a percentage thereof as the Board considers just and may assess and levy the same upon the employer.

Collection and application of additional percentage

(5) Any additional percentage levied and collected under subsection 4 shall be added to the accident fund or applied in reduction of the assessment upon the other employers in the class or subclass to which the employer from whom it is collected belongs as the Board may determine.

Merit system

(6) Where, in the opinion of the Board, the ways, works, machinery and appliances in any industry conform to modern standards in such manner as to reduce the hazard of accidents to a minimum and the Board is convinced that all proper precautions are being taken by the employer for the prevention of accidents, and where the accident record of the employer has in fact been consistently good, the Board may reduce the amount of any contribution to the accident fund for which such employer is liable. R.S.O. 1960, c. 437, s. 86 (1-6).

Demerit system

(7) Where the work injury frequency and the accident cost of the employer are consistently higher than that of the average in the industry in which he is engaged, the Board, as provided by the regulations, may increase the assessment for that employer by such a percentage thereof as the Board considers just, and may assess and levy the same upon the employer, and may require the employer to establish one or more safety committees at plant level. 1964, c. 124, s. 9; 1968, c. 143, s. 18.

Relief

(8) The Board, if satisfied that the default was excusable, may in any case relieve the employer in whole or in part from liability under subsection 4. R.S.O. 1960, c. 437, s. 86 (7).

ASSESSMENTS

160.—(1) The Board shall in every year assess and levy upon the employers in each of the classes such percentage of payroll or such other rate or such specific sum as, allowing for any surplus or deficit in the class, it deems sufficient to pay the compensation during the current year in respect of injuries to workmen in the industries within the class, and to provide and pay the expenses of the Board in the administration of this Part for that year or so much thereof as may not be otherwise provided for, and also to maintain a reserve fund to pay the compensation payable in future years in respect of claims in that class for accidents happening in that year, of such an amount as the Board considers necessary to prevent the employers in future years from being unduly or unfairly burdened with payments that are to be made in those years in respect of accidents that have previously happened. Assessments, levying

(2) Such assessments, if the Board sees fit, may be levied provisionally upon the estimate of payroll given by the employer or upon an estimate fixed by the Board and, after the actual payroll has been ascertained, may be adjusted to the correct amount, and the payment of assessments, if the Board sees fit, may be divided into instalments. R.S.O. 1960, c. 437, s. 98. Provisional levy

G. Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, (1964-5) 78 Harvard Law Review 713.

I. Introduction

I TAKE it as given that the principal functions of "accident law" are to compensate victims and reduce accident costs. Such incidental benefits as providing respectable livelihoods for a large number of lawyers and insurance agents are at best beneficent side effects. The notion that accident law's role is punishment of wrongdoers cannot be taken seriously. Whatever function we may wish to ascribe to punishment in criminal law, it simply will not carry over to civil accident suits. If the time-honored, though somewhat shopworn, distinctions between legal and moral fault and between damages and degree of culpability which prevail in tort law do not sufficiently demonstrate this proposition, then surely the prevalence of insurance priced on the basis of categories that have little to do with any individual insured's "goodness" or "badness" must.

Reduction of accident costs might arguably be viewed as covering even compensation of victims. For "compensation" as an aim means only that it is deemed more desirable for persons other than the injured to pay the costs of the injury. This is because if many pay the cost of an accident rather than one, or even if one pays it over time, the social dislocation costs of the accident may be reduced; [1] this is the basis of the theory of loss spreading. And even if loss spreading means no spreading — if it means only that the man with the deeper pocket pays — the same cost-reduction effect may be said to exist. For when those

who are "more able to pay" pay, we believe that fewer secondary undesirable effects will occur.[2]

Whether it is true that fewer such undesirable effects will actually occur is not certain. Still, it should not be too surprising that theories supporting paying for public perils like accidents by taxing the rich to some degree should find favor; our whole structure of paying for other public perils, like defense, is based on the assumption that fewer secondary social harms — costs — will result if the wealthy pay the greater proportion of the price.

But reduction of accident costs is more commonly taken to mean reducing the number of accidents or the costs of administering laws that deal with them.[3] To equate these aims with the savings that "compensation spreading" may achieve would be confusing. For this reason, compensation and reduction of accident costs will be treated separately.

Many recent writers have tended to focus on compensation as the main purpose of accident law. Were this emphasis proper, there would be no justification for limiting compensation to accidents and not spreading it across the board to illness, old age, and all the troubles of this planet. Of course, we do spread compensation beyond accidents to some extent, but it is the fact that we only do it "to some extent" that is crucial. Why is compensation for illness — even in highly welfaristic countries — much less complete than compensation for accidents? And why is the accident field kept a separate entity, where methods that achieve a fair degree of compensation spreading are used, but which would be woefully inefficient if compensation spreading were the only aim? Surely, if the type of cost reduction with which we are concerned is solely or principally that accomplished by diminishing secondary costs — social and economic dislocations — then a generalized system of social insurance covering all types of severe injuries would be the only efficient system.[4]

The answer is that accidents are not the same as diseases. There are ways to reduce the primary cost of accidents — their number and severity — that can, indeed must, be an important aim of whatever system of law that governs the field. One way is to discourage those activities that result in accidents and to substitute safer ones for them. Another is to encourage care in the course of an activity.[5] "Activity" and "care" are not, of course, mutually exclusive categories. If "activity" is defined narrowly or if "care" is broadly viewed, the concepts tend to merge. The activity of driving is not thought to be careless although a predictable number of accidents result from it. Driving through a busy intersection without brakes is careless and not an activity. Between these relatively clear cases the distinction becomes more difficult, as, for example, navigating without radar. In addition, an activity may properly be defined as the doing of something by an actuarial class, which may tend to do it carelessly. Treating the problems of accident law in terms of activities rather than in terms of careless conduct is the first step toward a rational system of resource allocation. The question is to what extent an economically rational system is our goal.

II. The Nature of the Decision for Accidents

Our society is not committed to preserving life at any cost. In its broadest sense, this rather unpleasant notion should be obvious. Wars are fought. The University of Mississippi is integrated. But what is more interesting to the study of accident law, though perhaps equally obvious, is that lives are used up when the *quid pro quo* is not some great moral principle but "convenience." Ventures are undertaken that, statistically at least, are certain to cost lives. Thus, we build a tunnel under Mont Blanc because it is essential to the Common Market and cuts down the traveling time from Rome to Paris, though we know that about a man per kilometer of tunnel will die. We take planes and cars rather than safer, slower means of travel. And perhaps most telling, we use relatively safe equipment rather than the safest imaginable because — and it is not a bad reason — the safest costs too much.[6]

Of course, it is rarely known who is to die. Indeed, in the uncustomary case of an individual — a known individual rather than a statistical unknown — in a position of life or death, we are apt to spend very much more to save him than in any conceivable money sense he is worth. And while I do not doubt this is as it should be, it seems odd that we should refuse to apply the same standards of "value beyond any price" when we deal with the same man's life as part of a statistic. But odd or not, it is the case.

A decision balancing lives against money or convenience when made in the broadest terms is not purely an economic one. The decision whether the Mont Blanc tunnel is worth building is not based solely on whether the revenue received from tolls through the completed tunnel will pay for the construction costs, including compensation of the killed and maimed. Neither is the decision whether to allow prostitution based solely on whether it can pay its way. Such a pure free enterprise solution has never been acceptable. It was in fact rejected by even the most classical of classical economists, though they felt it necessary to explain the rejection in terms of a theory that is as narrow or broad as any society, welfaristic or free enterprise, cares to make it.[7] The real issue, whether or not expressed in terms of these economists' "hidden social costs" or "hidden social savings" theory, is how often a decision for or against an activity is to be allowed regardless of whether it can pay its way. Such decisions operate, on the one hand, to create subsidies for some activities that could not survive in the market place, and on the other, to bar some activities that can more than pay their way. The frequency with which decisions to ignore the market are made tells something about the nature of a society — welfare or *laissez-faire*. What is clear is that in virtually all societies such decisions to overrule the market are made, but are made only sometimes.

Characteristically, in the field of accident law the decision whether or not to take lives in exchange for money or convenience is sometimes made politically or collectively without a balancing of the money value of the lives taken against the money price of the convenience, and sometimes made through the market on the basis of such a value. The reasons for this varying approach are not entirely reasons of principle. Great moral issues lend themselves to political determination. These questions must necessarily be decided in whatever political way our society chooses to decide moral questions. But "rotary mowers versus reel mowers," "one method of making steel as against another"

are questions difficult of collective decision. For one thing, they occur too frequently. Every choice of product and use hides within it a decision regarding safety and expense. The dramatic cases we resolve politically. We ban the general sale of fireworks regardless of the ability or willingness of the manufacturer to pay for all of the injuries that result. But we cannot deal with all issues involved in all activities through the political process. For most, the marketplace serves as the rough testing ground. A manufacturer is free to employ a process even if it occasionally kills or maims if he is able to show that consumers want his product badly enough to enable him to compensate those he injures and still make a profit. Economists would say that except in those few areas of collective decision, this is the best way to decide if the activity is worth having.

All this is just saying, in a slightly different way, that one of the functions of accident law is to reduce the cost of accidents, by reducing those activities that are accident prone. Activities are made more expensive, and thereby less attractive, to the extent of the accidents they cause. In the extreme cases they are priced out of the market: the market mechanism may thus eliminate an otherwise useful activity because it maims too many.

Since the smallest practical subdivision of an activity has been defined as larger than any particular mode of conduct that might be characterized as faulty, it might at this point be contended that it is throwing out the baby with the bath to aim at deterrence of activities rather than simply trying to eliminate conduct that is responsible for accidents. Why not forbid talking while driving through busy intersections rather than seek to deter driving generally? Why discourage perfectly useful activities when there is available an accident law based on fault, which ferrets out particular undesirable conduct?

Such questions assume two things: that we can define the undesirable conduct that is responsible for accidents apart from the cost of accidents it causes, and that we deter it through the current system of accident law based on fault. The first of these propositions is not totally unreasonable. There are acts or activities that we would bar in our society regardless of the willingness of the doer to pay for the harm they cause. It is these that we call "useless" [8] and feel that there is no societal loss in deterring them specifically. But certainly even if some such activities can be isolated, there are a great many other activities whose undesirability consists only in the fact that they result in accidents and then only to the extent that people would, if they knew the costs of these accidents, prefer to abstain from the activity rather than pay those costs. I think the discussion of "decisions for accidents" has shown that much.

Those acts or activities that we call "useless" fall into two categories. The first comprises those in which the doer has sufficient control over the deed so that criminal penalties are appropriate. If these penalties are properly set, they must inevitably do a better job of deterrence than the fault system. The second comprises those in which the doer has such insufficient control that criminal penalties are, under our system, deemed inappropriate. How many acts or activities actually fall in this category is doubtful, but it is certainly as to these that the traditional fault

system may be relevant. The question then is, Can we not deter these acts or activities more effectively than through a system of fault liability which, together with insurance, merely raises somewhat the cost to those who as an actuarial class tend to do these acts or activities? I suggest, and it is not a particularly original suggestion, that a system of noninsurable tort fines assessed on the individual doer of the "useless" act, together with general nonfault liability, would do a far better job of deterring valueless activities of this type.

This leaves those acts or activities that, as a society, we are unprepared to call valueless — those activities that, subject to some subsequent political reconsideration and modification, we want to permit to the extent that they can pay for their accident costs. I would suggest, though it is not crucial to my analysis, that these comprise the bulk of the decisions as to accidents. Despite Learned Hand's formulation that negligence is a balancing of the "danger of an activity" against what must usefully be given up to avoid that danger,[9] it is altogether too clear that a system of fault liability is designed to deal only with "useless" conduct and not with the more subtle interests involved in measuring the value and danger of an activity. If using a threshold of terrazzo is not deemed careless, then a system based on fault — as an all-or-nothing proposition — will have no effect whatever on this activity.[10] The best way we can establish the extent to which we want to allow such activities is by a market decision based on the relative price of each of these activities and of their substitutes when each bears the costs of the accidents it causes. This can be done by a system of nonfault enterprise liability, a system that assesses the costs of accidents to activities according to their involvement in accidents. By contrast, our fault system, with insurance, assesses the cost of an activity not according to the number of accidents it causes but according to the number of accidents it causes in which certain predetermined indicia of fault can be attributed to it. This results in a deterrence of only faultily caused accidents in an area where by hypothesis we are interested in deterring activities not because of some moral implications but because of the accidents they cause.

It follows from the above that the job of accident deterrence can be done more efficiently through criminal and semicriminal penalties aimed at useless conduct, plus nonfault enterprise liability,[11] than under a fault liability system. Two all-important cautions remain, however. The first is that we must know how to allocate the cost of accidents among competing accident-causing activities. Unless we have some way of deciding whom to burden with what part of the cost, the market will not help much in deterring the accident-causing activity. The second problem is no less puzzling. Even if we know what activity causes what accidents, it is not enough to say we will discourage that activity by making it bear the cost of that accident. For we must decide what the cost of an accident is. And this is not as simple as it seems. Is it the economic loss, is it pain and suffering, or is it the price needed to buy a willing victim? If the market is to tell us whether we want an activity despite its accident costs, we have

to put in approximately the right costs. It is these two crucial questions that I want to consider next, in reverse order.

III. What Costs Should Be Included

Assuming the activity responsible for an accident is in every case knowable, the first problem is to determine the cost of the accident. The task is simplified when the only costs are economic ones — that is, costs such as property damage that are calculable in terms of market values. Although problems in determining exact cost persist, there is at least no argument as to the subject of the computation. Indeed, if economic damages were the only costs of accidents there would be no objection to complete market rule. If building a tunnel under Mont Blanc would cost X million lire in property damages — and only in property damages — the enterprise would be deemed desirable if it remained attractive to investors who took these costs into account.

An exception to letting the market prevail would arise in areas where a component of the damage involves some noneconomic values. Thus, before a "nuisance" that can pay its damages is allowed to continue, a political or judicial decision that it is worthwhile must be reached. A market test of whether the activity can pay for the property it destroys does not demonstrate that it could pay for the noneconomic value it destroys.[12]

There are three ways of determining whether an activity ought to be allowed to destroy noneconomic values: political or judicial judgment (the government should have eminent domain powers; the Mont Blanc tunnel is desirable but must pay its economic damage costs); market judgment based on a rough conversion of noneconomic values into dollar amounts (let the jury decide the cost of pain and suffering, as well as of work hours lost; if the tunnel can pay for it, let the tunnel be); or a combination of the two. Thus, there may in some cases be a political decision that if an activity meets the market costs of some or all of its noneconomic damage costs (as estimated by a jury) it is sufficiently worthwhile to be allowed. In other cases the judgment might be that although an activity meets all of these noneconomic costs as best estimated, it still ought to be barred simply because it barely meets these and the activity is not considered good enough in the face of our distrust of a jury's estimate of these noneconomic values.

In fact, of course, we use all three methods in varying degrees and in varying areas. It is worthwhile to consider a little more closely the nature of these mixed determinations of what is properly the "cost" of an accident. Admittedly, confusion in making such determinations is engendered by a perhaps irrelevant, but humanly overwhelming, factor — compensation. I say that this is perhaps irrelevant for there is no reason — a priori — why whether a man gets compensation for pain and suffering should be tied to whether the activity that caused the accident should be made to pay the costs. Pain and suffering damages could be collected and not given to victims, or might not be collected from accident causers and yet paid out to victims from a social insur-

ance fund. The question whether, in terms of achieving the proper "allocation of resources" (the proper degree of deterrence of accident-causing activities), it is socially desirable to make the activity pay for the pain and suffering it causes is logically separate from the question whether some money equivalent of pain and suffering is to be shifted or left as chance makes it fall.[13]

Assuming that the problems of compensation and allocation of burdens can be separated, the problem of what cost an activity should bear must be approached in terms of the function of cost allocation in deterring accident-causing activities. The function is not to abolish all accident-causing activities. Rather it is to cause the price of products or activities more nearly to reflect their costs. In other words the accident costs of making widgets out of aluminum are to be put on aluminum widgets, and the accident costs of making widgets out of steel are to be put on steel widgets, so that the nation of buyers can decide, on the basis of a full picture of what it costs to have each, how many of each are desired.

I have elsewhere described the ethical and economic postulates that underlie the notion that the best product mix is achieved when production decisions are made on the basis of consumer choices grounded on prices that reflect the costs — including the accident costs — of competing products.[14] I have also pointed out that by and large we are still committed to these ethical and economic postulates. I shall not repeat that discussion here. It is enough for this article to assume *arguendo* that the best product and activity mix will be achieved if prices of goods and activities reflect what we feel are the true costs they impose on society.

This assumption underlies a determination of (a) what the costs of an accident are, and (b) whether an activity will be allowed (1) if it meets its economic costs, (2) if it meets both economic and noneconomic costs, or (3) only if it can "buy a willing victim." It describes a system in which the costs that people feel to be relevant to the decision between aluminum and steel widgets must be included in the costs of manufacturing each.

For example, suppose that my Electromobile is destroyed in an accident. Although its market value was only one hundred dollars, I had a great sentimental attachment to it because my Aunt Euphoria gave it to me. Ought the price of driving to reflect the destruction of this sentimental value? Do we feel in choosing between driving and riding trains that the fact that driving — let us assume — destroys more of such sentimental values than trains is something about which we wish to know? Is it something we wish so strongly to know about to go through the expense of estimating it in a thousand and one accidents in order to have it become a part of the relative price difference between driving and riding?

Silly as this example may be, it has the virtue of demonstrating that certain types of noneconomic damages are not normally treated as costs. Others, like pain and suffering, are taken into account when assessing the cost of an accident. The line between them is drawn by some form of collective judgment. When the expense of estimating the cost to society of some species of noneconomic damage is thought reasonable, then that cost is computed and entered into the relative price of activities.

The process of computation that has been adopted indicates a certain lack of faith in the accuracy of a translation of noneconomic values into dollar amounts. First, a political or judicial decision is made as to what kinds of costs are not worth bothering with. Then, a jury, often thought to be the institution most likely to reflect collective judgment, evaluates in each case what the nonmoney costs are worth. Thus, we allow an *ad hoc* reexamination of the political decision.[15] The limitations that necessarily inhere in this rather haphazard way of deciding what are real costs and their amount, as well as the fact that the choice must be influenced by the expense of evaluating these nonmoney costs, go far toward explaining why the market is only allowed to operate to a limited extent in deciding for or against accidents.

The nonmoney value of my home destroyed when International Phtui Works — an alleged nuisance — renders it unlivable may be real enough. But this should not be considered when the cost of evaluation is so great that the relative price of Phtuinuts would be biased more by including it than by leaving it out.[16] The only alternative is to try to decide at the beginning, collectively, whether Phtuinuts could pay for this value ignoring the cost of evaluation. In a real sense this is what we do when we decide that the Phtui Works, though a nuisance, will not be enjoined but only be made to pay economic damages. This may also be what we decide when we prohibit some accident-causing activities though they can pay their economic costs, and even perhaps the estimated dollar value of pain and suffering.

Needless to say, many decisions are in the other direction. Driving is allowed if drivers can pay economic loss plus a large measure of noneconomic loss. Although the activity does not even then bear the full measure of its cost, the additional computation is simply too expensive to undertake. It is assumed — decided collectively — that to the extent that these nonincluded losses are greater than in competing activities, driving is of sufficiently greater uncomputed noneconomic value to cover them.[17]

IV. What Is a Cost of What Activity

The difficulty of deciding which costs are relevant is painfully apparent. When compounded with the problem of deciding what costs are allocable to which activity, the game of deterring competing accident-causing activities by making their prices reflect their full cost and letting the market decide may well seem not worth the candle. Why is it sometimes thought that a heart attack is caused by an automobile accident and sometimes by the victim's occupation? Is a pedestrian-auto accident to be attributed to driving or walking? Despite their familiar ring, these questions are not meant to herald a metaphysical search for ultimate causes. Rather they must be approached in terms of a "social cost accounting" system,[18] in which activities are made to bear their costs in pursuit of sounder resource allocation.

The methodology involved in finding the accident costs of an activity is deceptively simple. The cost of any activity, A, includes the sum of the cost of accidents in which A alone is

involved and some part of the cost of all other accidents in which *A* is involved with other activities. Solving the problem is more complex. A solution requires that criteria be evolved for apportioning the cost of an accident among those activities that caused it. There is no formula for allocating the cost of an accident among the activities involved, as there is no such formula for allocating overhead costs among activities that share the same facilities. One is reduced to making guesses in light of the goals of the system, as do cost accountants and regulatory agencies. When the system extends to the whole of society, the goals become harder to define and the guess more open to error. A cost accountant for an oil-drilling company need not study the effect on the rest of the economy of buying extra equipment needed to recover gas as well as oil. A student of accident law cannot a priori neglect the effects of discouraging driving on, for example, walking, busing, and cycling.

A. Bargaining Situations

There are, happily, some situations in which it will not matter which of two activities initially bears the cost of an accident since ultimately the cost will affect the behavior of both. In theory, these are all the situations in which the two or more possible accident-causing activities are related by bargaining.[19]

Thus, in theory, and to use an example from most basic torts books, it ultimately makes no difference whether the dock owner or the shipowner in *Vincent v. Lake Erie Transp. Co.*[20] is held liable for damage to the dock caused by an unexpected storm. If the shipowner is liable, dockage fees will be less; if the dock owner is liable, dockage fees will be more. In either case the extent to which each activity ultimately bears the loss depends on its bargaining power with the other — essentially on how easily the other can find a cheaper, because less accident-prone, substitute. If the loss is put on ships, the ships will tend to minimize their losses by going to safer docks, until unsafe dock owners have cut their prices sufficiently to make using them and bearing accident costs as cheap as using safer docks. If the dock owners bear the loss they will minimize it by installing safety devices until it becomes cheaper to pay for the accidents rather than installing more safety devices. The same will apply in reverse if the cheapest way to avoid the loss is to make safer ships. In any event, the least expensive way to minimize the loss will be sought out and used whichever of the two is initially liable.

This kind of argument can be made with varying degrees of realism in any bargaining situation. Should the cost of industrial accidents be put on workers or on their employers? Should the cost of rotary as against reel lawn mowers be borne by the manufacturers or the users? Theoreticians will insist that in terms of "general" deterrence of accident-prone activities it makes no difference either way.[21] In fact, of course, it can make a great deal of difference, but for reasons that do not require us to answer the broader question of "what costs belong to what activities."

The first reason for the difference is that one of the two actors may, in practice, be far better able than the other to evaluate the accident risk, that is, the expected accident costs. And if this is the case, his activity is the more suitable one, in terms of deterrence of accident-prone activities, to bear the initial loss. If individual purchasers are made to bear the cost of rotary mower

accidents and invariably underestimate their likelihood, they will not purchase a substitute mower that seems more expensive. Presumably, the rotary mower industry, on the other hand, knows pretty clearly the expected cost of using mowers in any given year; and by putting the cost directly on the industry, individuals are made aware of these costs and are better able to make the appropriate choice for or against accidents. To the extent that they choose against accidents (against the higher-priced mowers, reflecting the accidents), pressure will then exist on the mower companies to develop safety devices.

The second reason is that it may not cost the two parties the same amount to insure against the loss. If the loss is placed on the party for whom insurance is less available or more expensive, a false cost — the excess cost of his insuring — will be made a part of the price of the goods. Self-insurance does not modify this; it only suggests that occasionally one of the parties is sufficiently large so that noninsurance is the cheapest alternative. Once again the choice of loss bearers depends on which of the two parties to the bargain can inject the cost into the price of the goods or service most cheaply.

The third reason is somewhat more complex. If placing the loss on one of the two parties to the bargain results in all or part of the loss being removed from both of the parties and placed on totally unrelated parties, then such placing of loss is undesirable. For example, if placing the cost of a rotary mower accident on the user resulted, for political or social reasons based on a desire to compensate, in the loss being paid for by the government out of general social insurance, such loss allocation would tend to frustrate the proper choice for or against rotary mowers. If placing the loss on the mower company instead did not result in such an externalization, there would be a clear reason for placing the loss on the mower company.

The classic example of all this is, of course, industrial accidents. It did make a difference in terms of accident deterrence (despite the theoreticians of the time) whether industrial accidents were charged first to workers or to industry. This was not because "metaphysically" industry always was more the *cause* of the accidents than workers, but because industry could insure more cheaply than the workers and was better informed on what the costs of accidents would be, and because placing the loss on the workers would most likely have resulted in externalizing part of it from both workers and industry. Placing the loss on industry therefore better enabled us to minimize accident losses by an appropriate choice for or against accidents.[22]

The theoretician will object that the placing of such costs arising from a bargaining situation on anyone but the ultimately injured party is in fact compelling the ultimately injured party to insure himself against that accident. He will argue that the user of rotary mowers might find it cheaper not to have the company that manufactures such mowers pay for any accident costs to him, because he is a careful user and therefore the accident risk to him would be less than the average accident costs reflected in the price. Or he might assert that he is a user to whom a toe means less than to most, and that therefore, when the price of mowers to him reflects the average cost of the average toe, he is overpaying.[23]

To some extent this is of course true. The choice to self-insure, or to insure in other ways, is removed from the ultimately injured party when in a bargaining situation the original cost is put on the other party. But the reverse is equally true, because there is nothing "ultimate" about who is the ultimately injured party. Thus, if the initial cost of mower accidents is put on the users, the manufacturers of mowers are as forced to insure with the users as the users would be forced to insure with the manufacturers if the cost were put on the manufacturers. And the same problems of overcharging the more "careful" manufacturer through such compulsory insurance exist as did in the reverse situations. In fact, if there is a significant difference in the accident potential of one user from another, the cost of the product to him will reflect that difference, even if the original cost is not put on him.[24]

The best we can do, then, in a bargaining situation is to place the original cost on the party to the bargain whose actuarial class can best evaluate the risk of such costs in the future.[25] There will be many situations in which it will not matter because both sides of the bargain are equally informed. There will be others in which it is very hard to say which side is better informed and other considerations such as specific deterrence, or compensation, will rule because general deterrence gives no guide or does not make sufficient difference. But there are many situations in which it seems that a difference does exist, and here we can expect liability to be placed on the better informed party. Workmen's compensation and, to a lesser extent, the dichotomy between respondeat superior and the independent contractor rule are examples of this choice.

Recently, it has been ably argued that the same reasoning may apply in a great variety of situations in which a bargaining or contractual relationship does not exist between the potential original bearers of the accident cost.[26] The argument runs that if the cost of a factory-smoke nuisance, for instance, is put on the homeowner rather than on the factory, and the cheapest way to avoid this cost is not for the homeowner to move or wear a gas-mask but is for the factory to install a smoke-clearing device or cut down production, the homeowner will pay the factory to do this. On the other hand, if the cost is originally put on the factory, and the best way to minimize the loss is to get the homeowners to move, the factory will find it cheaper to pay for such a move rather than to cut down production. Either way, it is argued, the market will find the cheapest way to deter or minimize the loss. And while there may be some difference in the end as to who is richer and who is poorer, in terms of general cost deterrence the same results will be achieved whoever bears the initial loss.[27]

The argument is essentially that a bargaining relationship can always be established between the original loss bearer and the party best able to minimize the loss. In a perfect world such a bargaining relationship will always result in the appropriate minimization of the loss.[28]

The first problem with this view, and one fully recognized by its author,[29] is that it costs money to enter into such a bargaining relationship. Thus, while it might be cheaper to install a smoke-clearing device than to have the neighboring homeowners move, if the damage is originally put on the homeowners it may be more expensive to get them together to bargain with the company and then to pay the company to install the smoke clearer than it would be to move. In such a case placing the loss on the factory initially would, in fact, minimize losses whereas placing it on the

homeowners would not. The difference between this situation and the situation in which the two potential loss bearers are already bargaining (for example, *Vincent v. Lake Erie*) is that there is no added cost of bargaining caused by placing the loss on one party rather than the other.

The second problem with the view is that apart from costs there are many situations in which artificial bargaining is even theoretically impossible because one group of "bargainers" cannot be organized without some degree of outside coercion. Suppose that the cheapest way to reduce automobile-pedestrian accidents were to have fewer cars on the road. If the cost of accidents were originally placed on cars, the desired effect to the extent desired would be achieved. If the cost of accidents were placed on pedestrians, however, quite apart from the cost of finding and paying some auto users not to drive, the desired effect would never come about. This is because, absent some coercion, some pedestrians would decline to pay their share of the cost of bribing the drivers to drive less. They would seek a free ride on those pedestrians who sought to lessen driving by paying for the diminution. The situation seems analogous to that in a "perfectly competitive" market where despite the fact that higher returns could be achieved by sellers if they could all join to raise their prices, no such price rise occurs because each individual seller seems to have an advantage in selling for less.

For both theoretical and practical reasons, therefore, there are many situations in which we cannot assume that it makes no difference, in terms of accident deterrence, who is saddled with the original liability.[30] Nor can we assume that in these cases we

need only look to the party who can minimize the cost of accidents most easily and put the cost on him. First, we may not know who he is. Second, we cannot assume that any single party is in such a position. For instance, to return to automobiles and pedestrians, it may well be that the best way to reduce accidents is to have both less driving and less walking. If this is so, given the limitations of "artificial bargaining," we cannot simply put all the cost on one or the other. Third, and perhaps most important, the world is infinitely more complex than the example. The choice is not between fewer pedestrians or fewer cars. It is among fewer old cars, new cars, cars driven by teenagers and aged ladies, fewer old pedestrians and crippled pedestrians, and all of these in relation to fewer buses and trains and better streets, better street lighting, and so on forever.

In other words, we cannot begin by determining the combination of activities that, given what we consider to be real costs of accidents, brings about the degree of reduction of accidents that we want in the cheapest possible way.[31] Nor can we count on the market to accomplish the same thing through artificial bargains between parties who originally bear the accident costs and parties who by their activities can reduce accident costs. The result is that although there are situations in which the choice of an original loss bearer is relatively easy because it either makes no difference or because the choice depends on an estimate of relative abilities to value properly the risks involved, there are other situations in which the choice of the original loss bearer or, if you wish, the question of what loss belongs to what activity, is not only important, but hard!

B. Categories and Subcategories

This difficulty, though, is not grounds for abandoning an otherwise valuable approach if partial answers may be discovered and if the partial resolution is better than none at all. In many situations in which it is difficult to determine whether an accident is a cost of one activity or another, it is still sensible not to attribute it to a third activity. The cost of a pedestrian-auto accident may not easily be divided between driving and walking, but in terms of general accident deterrence it is better to allocate it to one or the other or both rather than to "externalize" it. The reason should be clear. If the costs of automobile-pedestrian accidents are externalized and treated as part of the cost of a "social insurance scheme" financed out of general taxes, the only decision that this might, in theory, affect is whether to live in America or Argentina; once people have decided to live in America, it will not affect their decision to drive cars or to walk. They will not be in a position to make the proper choice for or against accidents, and no "general deterrence pressure" will exist.

This is not to argue that auto-pedestrian accidents are not also general costs of living in America. They are, of course. But putting the cost on autos or pedestrians will affect not only the decision to drive or walk, but if the cost is significant enough, the decision to move to Argentina as well.

This process of allocation can go significantly further. It is better to apportion the accident costs among subcategories of drivers on the basis of the accident proneness of the category rather than to charge the accident costs equally to all drivers. If driving's share of auto-pedestrian accidents is paid by a set tax on driver's licenses, some desired deterrence on driving would be achieved. This allocation of costs, however, fails to distinguish between driving old cars and new cars, and the best way of reducing accidents (the cheapest way in terms of the choice for accidents) might be to reduce driving somewhat but to shift most driving to newer cars.

I shall not discuss now how far we can go in subdividing activities in allocating accident costs. Suffice it to say that there comes a point where the cost of further subclassification is greater than the worth of the choice offered, and that in practice it is possible to find that point. Indeed, in the context of subclassification for fault proneness, insurance companies make exactly such a decision every day when they charge higher rates for unmarried male drivers under twenty-five but do not break this down into unmarried male drivers of twenty-two and seven months as against unmarried male drivers of twenty-two and eight months.

The point is simply this: were there no costs involved in subclassifying activities, it would always be best to put the accident cost of an activity on its smallest subcategory. To the extent that the subcategory has the same accident proneness as another subcategory, no choice between these subcategories would be affected nor would one be desired. To the extent that subcategories were differently accident prone, some movement to the safer ones

would result because the greater real cost of the more dangerous one would be reflected in its price. In either case, the activity of which both were subcategories would automatically also reflect its own accident proneness relative to other safer activities. Instead, if the costs were allocated solely to the larger category or activity, any possible "general deterrence" at the "subactivity" level would be lost.

Thus, although it is unclear whether an accident cost is attributable to driving or walking, in terms of general accident deterrence it is better to allocate it to one or the other or both than to pay it out of general taxes.[32] And to the extent that the cost is put on these activities, further subclassification by drivers, type of cars, and the like, causing people to shift from the more accident-prone subclassification to the safer one, will bring about minimization of accident costs.

In this sense, then, the problem of "what is a cost of what" is further diminished. For even in a nonbargaining situation where accident costs are not readily divisible between the activities involved, it is clear that placing the costs on them is better than externalizing the costs.

C. Where Certain Comparisons Are More Important Than Others

The lack of a simple theory for apportioning costs is no obstacle in a bargaining situation where the parties are able to work out the proper allocation of burdens. Nor is it a bar when there

dent. Thus, if it is clear that pedestrianism is ineluctably here and nothing much can be done about it or its habits, and our concern is whether it is better to have driving or busing or how much of each and what kind of each, then it is proper to consider as part of the costs of cars and buses the added accidents they each bring to a pedestrian's world.[33]

The same would be true if placing part of the cost on pedestrians would result, for political, social, or compensation motives, not in pedestrians bearing this cost at all but in having the cost removed and externalized both from pedestrians and automobiles, through state compensation out of general taxes. In that case we might just as well let cars pay for all joint car-pedestrian accident costs, as the social insurance would prevent the placing of costs on pedestrians from leading to any accident-deterring choices between pedestrianism and, for example, cycling. This being true, we might as well get the maximum of potential "general accident deterrence" between cars and buses by placing full pedestrian-car accident costs on cars and full pedestrian-bus accident costs on buses.[34]

This would also be the case if the pedestrians' share of the costs was generally not paid out of "walking accidents" insurance, or its equivalent, but was, because pedestrianism is not an organized activity like driving, insured against as part of a generalized "harms-that-can-befall-one" insurance. In that case by actuarial necessity the cost is externalized from pedestrianism and made a general cost of living. Here also the placing of part of auto-pedestrian costs on pedestrians would fail to affect the degree of

pedestrianism.[35] Therefore, putting the full cost of pedestrian-car accidents on cars and of pedestrian-bus accidents on buses, for a more complete comparison, is the best we could do.

Furthermore, if we are concerned with driving and walking as compared to television viewing — if the choice is between taking a stroll or a drive as a form of amusement, as against staying home and glaring at the TV set as a form of amusement — then it does not matter how much of the cost of driving and walking accidents is borne by either so long as together they bear it all. And finally, when concern centers on the problem of determining whether activities should be kept apart in order to limit costs, it would seem best to place the costs on the party who can most cheaply undertake the task of separation. The assumption underlying these propositions is that our society is interested in a limited number of comparisons and treats a wide range of potentially changeable things as given. While fuller comparisons might be desirable, the limited ones may well be the best that can be done.[36]

In addition, the problem is somewhat mitigated by the theoretical possibility of what I have called artificial bargaining. Thus, suppose that the costs of vehicle-pedestrian accidents are placed entirely on cars and buses because concern was focused on adjusting cars relative to buses and types of cars relative to each other. Assume also that the concern was misplaced, that we should have been concerned with pedestrians as against cyclists or transferring pedestrians to other areas, because those would have been cheaper ways to avoid these accidents. This mistake, if sufficiently gross, might be corrected by artificial bargaining. Drivers, or auto makers worried about the high cost of using their products, might find it worthwhile to build pedestrian malls away from busy streets or to bribe walkers to take up cycling. Although artificial bargaining has its limitations both in cost and feasibility, it may help to mitigate errors that are sufficiently egregious. Attempting to decide what comparisons are most important, together with the safety valve of artificial bargaining to cure the worst mistakes, may be quite good enough,[37] or at least better than any alternative method of allocating costs.

And this is a very important point, because ultimately such costs will be allocated for better or worse, and someone will have to bear their burden. Allocation based on an inexact but rational guess as to what is an important comparison is likely to be more helpful in leading to a sensible choice "for or against accidents" than an allocation based on specifically irrelevant factors like fault or social insurance, which remove costs from the arena of most relevant comparisons.

D. Where All Comparisons Seem Equally Important

We should realize that in a great many situations, the important comparison will not be readily apparent. Where *A* and *B*, a set of substitute activities, are involved in accidents with *C* and *D*, a set of activities that compete with each other and that do not compete with *A* and *B*, and where, moreover, we are concerned with the relationship within each set, we face the most difficult problem in allocating costs. The same is true when concern focuses on the comparative worth of substitute activities that are involved in accidents with each other.

Were all the costs of mailman-dog accidents and mailman-cat accidents placed on the Post Office Department, an important element in a choice whether to own a cat or a dog would be removed. The Post Office might still find it worthwhile to bribe people to trade in dogs for cats, but the costs of striking an artificial bargain are high. Thus, if the choice between dogs and cats

might be important in reducing the seriousness of postman-animal mishaps, *some part* of the postman-dog and postman-cat costs should be placed on owning dogs and cats. Not all should, though, as that would prejudice the decision of whether to give mailmen animal repellents or to deliver mail by car.

The question then is how much to allocate to each activity. I would suggest that: (1) unless there is reason to suspect that the choice of one set — for example, cats and dogs — is more likely to minimize accident costs than the other set, or (2) unless it is clear that one of the two is in a much better position to undertake artificial bargaining to correct an error, or (3) unless other motives, such as compensation, suggest a division, it does not make much difference how the costs are divided so long as all members of the same set bear the same proportion. The best that can be done is to put a cost pressure on owning dogs as against cats proportionate to the costs each have in common with mailmen. Thus, the price of owning dogs or cats will at least show the relative danger each bears of injuring postmen even if it does not show the absolute value of that danger.

This leaves the problem of allocating costs in instances where the activities involved are substantially substitutes, and it is important to compare them in order to determine the best mix — dogs against cats. A more significant example might be a comparison between large cars and small cars. The cost of having both may be significantly greater than the cost of either alone, since, when a large car and a small car collide, the damage is usually greater than if two small or two large cars had been involved.[38]

In many situations where having two activities results in greater costs than having either one alone, it is simply not worthwhile working out an allocation of these costs other than by a simple division. This will be clearly true if having both activities does not add a great deal to the cost of having either alone. It will also be true if the diversity involved in having both activities seems to be significantly desired by society collectively, regardless of how much particular individuals wish to have the diversity.[39] Only when these two conditions are absent and in addition the activities are close substitutes will it be realistic to think that the degree of diversity will be affected by placing the added cost of having both activities on one or the other of them.

Some analytical tools can be brought to bear on this perhaps not overly significant aspect of the problem, but for the most part they are somewhat impracticable. First, when one of the activities can be thought of as being added to a "preexisting situation" it might be proper to allocate the entire diversity cost — the difference between the cost of the accidents involving *A*-*B* and the estimated cost if *A*-*A* had been involved — to the new activity. Thus, if we lived in a world of large cars, small cars would only be worthwhile if their drivers were able to meet the costs they would add. This would be true even if total costs would be lower in an all small-car world than in an all large-car world if the cost

of changing entirely to small cars is greater than the savings such a change would bring. Second, when neither activity can be thought of as dominant, then the costs of diversity should be borne by the activity that is otherwise socially more expensive. If social costs would be minimized by having only small cars, then the difference between the costs if only small cars were involved in accidents and the costs when large cars and small cars are involved should be placed on those drivers who choose the socially more expensive large cars.[40]

Though the practical problem of knowing which of the substitutes taken alone would have the lowest social cost cuts deeply against the usefulness of this type of analysis, to some extent an *ad hoc* guess as to which activity would have been more desirable as an original matter can perhaps be made. When this sort of guess seems too hard, the best that can be done is to forget about "diversity costs" and divide accident costs so that a choice between the competing activities can be based on other costs of each.

E. A Practical Approach to Multilateral Comparisons — "Involvement"

Despite the lack of any inclusive theoretical basis for apportioning the cost of an accident among the activities involved, substantial guides to the allocation of costs in a nonfault system of accident law have been shown to exist in many situations. Yet a great many cases remain in which there are no rational criteria for dividing the accident costs among the activities involved. A straightforward, if rough, solution for these cases is possible. The cost of each accident might be divided pro rata among the activities involved and then cumulated for each activity.

For example, if a car and a pedestrian are involved, the cost will be split between driving and walking. If a car, a pedestrian, and a cyclist are involved, then the cost will be divided three ways. If a cost can be allocated between two of the three according to any of the previously derived criteria, then this will be done for two-thirds of the cost and the third activity will bear the remainder. At the end of any given period of time, those activities that are involved in more accidents or in more expensive accidents will bear the greater proportion of all costs. According to theory, safer but formerly more expensive substitutes will replace more dangerous activities as these are made to bear their costs.[41] Even if categories are initially defined in terms of factors that are not related to accident proneness, this defect will eventually work itself out of the system.

Thus, if everyone drove blue cars and cars were involved in all accidents, then driving would bear a large part of all accident costs. Walking, cycling, and the like would bear the rest. If somehow "blueness" were thought significant, a shift from blue to red cars would occur; but since it would not help to reduce accident costs, the mistake would not persist. If a shift from big cars to small cars would reduce costs, then such a shift would be forthcoming to the extent that the cost differential between small cars and large cars was magnified by the previous year's cost allocation.

This method allows for special treatment in cases where the more exact criteria for allocating costs exist, while dealing with all other situations in terms of the preponderance of involvements. Its basis is the assumption that although criteria for allocating costs cannot always be found, criteria for determining involvement can. Again, it is necessary to warn that activities are not treated as "involved" in order to round out metaphysical notions of causation, but rather to make comparisons between potential substitutes more meaningful. It does not further this purpose to treat each *sine qua non* cause as involved in an accident. For while in most accidents there will be among the *sine qua non* causes some activities that may profitably be compared with substitute activities, there will also be other such *sine qua non* causes not worth comparing. This may be because: (1) there are virtually no substitutes with less accident-causing potential; (2) the activity and its substitutes will appear so infrequently in such accidents that any cost allocation to them could have no significant effect on choice; or (3) placing the cost on them initially would result in having the cost removed and externalized from all the causes.[42]

Determining which causes are to be excluded as coincidental will not always be a simple proposition. For example, suppose a car and a pedestrian collide, and the driver notes that he was distracted by a low-flying plane. In the normal course of things, planes will not be a sufficiently significant cause of car-pedestrian accidents to be worth bothering about. If, however, a fair number of accidents were to occur near airports, and enough of them involved distraction by a plane, then it might be worthwhile considering planes as involved. In that case, the accumulation of these costs and other costs caused in part by airport noise might induce installation of noise-diminishing devices or relocation of airports. The point is that often it will not be enough to look at the immediate case, but instead it will be necessary to discover whether an apparent coincidental cause is similarly involved in other types of accidents.

In other words, "involvement" is a term of art designed to include all those factors that are part of an accident and that may be replaced by substitutes with a substantially different accident potential.[43] It includes those factors that are "typical" of an accident while ruling out those that are "incidental." Although the example shows that typicalness and incidentality are not altogether easy notions, they are probably workable.[44]

V. Conclusion

Where, then, does all this bring us? It should be clear that in this analysis, I have made no attempt to set up a "system" for dealing with accident costs in any or all given areas. I have made no attempt even in the automobile-pedestrian area to specify whether accident costs ought to be divided between pedestrians and cars or put solely on one party, and if they ought to be di-

vided, whether the best way is by excluding certain damage items from allowable recovery or by a computation of all damages followed by a division. I have not done these things because such specific policy decisions depend only in part on the analysis of the "general deterrence" factor that I have centered on. In addition, even if they were solely dependent on that factor, quite a lot of empirical information on the administrative expense of various systems, as well as on the importance of various "comparisons," would be essential.

What I have tried to do is clarify one part of the theoretical basis for such practical judgments. In doing this, I have suggested that usually in our society, decisions on how much we want to deter accidents are made in a way that combines market choice and collective political judgments. My feeling is that this choice can be made more effectively through a system of accident liability based on accident "involvement" instead of fault, combined with a system of criminal and semicriminal penalties for specific behavior, and overseen by collective political judgments on the desirability or undesirability of certain activities regardless of the market.

When we are dealing with deterrence of activities that have some social usefulness but that cause accidents, the first step toward deciding how much of these activities is wanted can still, in a substantially free enterprise society, be best determined by the market. There are simply too many such decisions to be made collectively in any intelligent fashion. However, in a wide and perhaps growing area, we are dissatisfied with letting a purely market determination of social usefulness rule. This is because of the inherent inexactness of both the market mechanism and of any estimate of accident costs and to whom they belong. It is also because in a growing area we are becoming convinced, whether rightly or wrongly, that individuals do *not* know what is best for themselves.[45] For both these reasons, some degree of subsidization or deterrence of activities based on collective decisions overruling the market is inevitable and probably desirable. Such decisions — like that to subsidize drivers over seventy, or to bar drunken driving — are, however, best made openly and in the face of the market decision, so that it is clear to us when we make such decisions that what we are really saying is, "In this case considerations *other* than individual choice among alternatives are paramount and supersede individual choice."

I do not, with all this emphasis on "general deterrence" of accident-causing activities, foreclose the specific deterrence that, it is often asserted, fault liability brings about. I simply believe that the best way to bar groups of acts that we feel politically are sufficiently bad that they should be barred regardless of their market usefulness is not through a "fault" system connected with insurance devices that remove most of the desired specific deterrence. Instead, the way to effect such a political judgment is through criminal or semicriminal penalties.

In elaborating such a "general deterrence" approach I have spent a great deal of time on the very difficult problems of what the costs of accidents are and to whom they belong. I have done this from the point of view of general deterrence and not at all from the point of view of compensation. This is simply for clarity and not because I would slight compensation as a goal of accident law. I will readily admit, however, that if compensation were the only goal, then by far the most effective and efficient method of accomplishing it would be through a system of general social insurance, which would externalize the costs of accidents from any market decisions.

Social insurance, however, is not likely to be the solution if we are interested in the "savings" brought about by general deterrence, as well as the savings brought about by compensation. In fact, if it can be shown that a system is available that combines a substantial amount of general deterrence with an adequate degree of compensation, that system may be far better than either social insurance or an optimal general deterrence scheme.

The result is that we may very well be influenced in the division of accident costs, between autos and pedestrians say, by compensation motives. If we are in doubt about the proper division of costs, or which are the important comparisons from a general deterrence standpoint, it may well be proper to make the division in a way that accomplishes compensation (risk spreading) best. For in such a case little general deterrence savings would be lost through such a move, and substantial compensation savings gained.

Indeed, it would be the height of foolishness to establish a system — even a perfect system — for market general deterrence if this system were so unpalatable on compensation grounds that it would soon be replaced by social insurance in order to accomplish compensation. And this, of course, is another problem with fault liability. For even if it accomplished general deterrence as well and as cheaply as an "involvement" system (which I believe it does not), it is — apparently — so undesirable from a compensation point of view that it is constantly under attack.

This attack leads too often to the simple alternative of social insurance. Such a result would eliminate even the attenuated general deterrence that the fault system accomplishes, and therefore would substantially decrease the range of informed individual market choices with respect to activities and accidents in our society. In other words, if we stick too obstinately to a system that gives us some but not very effective general deterrence but very poor compensation, we may find that we end up with a system that gives us no general deterrence, or market choice on accidents, in exchange for a perfection in compensation we may neither want nor need. This would be so despite the fact that a little work can develop a modified enterprise liability approach that would give us better general deterrence than fault and as much compensation as we want.

Ultimately, of course, the problem of what we will do in this area reflects a much broader problem. For here, as so often, we are faced with the fact that a time-honored system (fault) fails to satisfy a modern demand (compensation). We can react to this by dividing into hostile "conservative" and "radical" camps with the result that either nothing gets done or we abolish everything about our previous system, and set up one that meets the demand regardless of its other consequences (social insurance). Alternatively, we can work to see if there are other ways to retain what we believe is fundamental in the old, and yet adequately meet the demands it failed to satisfy. I believe that somewhere in a nonfault enterprise-liability approach, combined with tort or criminal fines for some specific acts, such a satisfactory middle ground exists. I also believe that the finding of such middle ground is the mark of a legal-political system that works.

[1] Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517–19 (1961). The use of terms like "cost," "cheaper," "afford," and "socially more expensive" in the current article is extremely sloppy from any economist's viewpoint; I have used the terms in this unrigorous way in an attempt to make the article intelligible to noneconomists. This effort may be misguided but I think it is essential. It would not be too difficult to translate these terms into their relatively precise economic meanings. I have not, however, done this consistently in footnotes because it would make the piece even less readable than it is. Some appropriate definitions may be found in my article, *supra* at 503–04 nn.15 & 18.

[2] *Id.* at 527–28.

[3] The cost of administering accident law is in a sense the control that tells us if any system of reducing overall costs is worth it, or whether we would not be better off with a less effective, but cheaper, system.

[4] There might, of course, be perfectly respectable political objections to such a social insurance system, despite agreement that compensation is the overriding goal and despite the fact that social insurance is the cheapest way of accomplishing it.

[5] But discouraging dangerous activities and encouraging care in the course of an activity are not the only aims of the system; as we have seen before, compensation is an equally important aim. As a result we may well not want to go as far as we otherwise would in trying to reduce the primary cost of accidents if this would be accomplished at the expense of compensation.

[6] It should be apparent that while some of these accident-causing activities also result in diminution of accidents (the Mont Blanc tunnel may well save more lives by diminishing traffic fatalities than it took to build it), this explanation does not come close to justifying most accident-causing activities. Thus, grade crossings are allowed because they are cheap, not because they save more lives than they take.

[7] See, *e.g.*, PIGOU, THE ECONOMICS OF WELFARE (4th ed. 1932).

[8] This is, of course, an interesting use of words. Driving without having an inspection, like drunken driving, prostitution, and widgets, undoubtedly has its adherents. They are — let us assume — willing to pay for the accidents they cause, yet as a society we say they may not so choose and bar the activity anyway. We call the activity valueless and say there is no societal loss in proscribing it, not because it has no value, but because we do not accept individual judgments as to its value.

[9] Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941).

[10] See Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210 (1951).

[11] Such a nonfault enterprise liability does not at all preclude us from making collective judgments against the market — either to bar activities that seemingly can pay their way or to subsidize some that seemingly cannot. For example, let us assume that under a fault standard we discourage 18–25 year olds from driving because they cause proportionately more accidents than other groups of drivers when they are doing something we currently term "faulty." Let us further assume that people over 60 are involved in proportionately as many accidents — but that currently they do not pay as much insurance because their accidents are not "caused by their fault." A nonfault system would put the two groups in similar insurance categories. To start with, fewer people above 60 could afford to drive. If accidents were our concern — rather than metaphysical or moral fault notions — this would be a good result. But at this point we might feel — collectively — that driving at least at certain ages is too important and that individual members of our society ought to be allowed to drive whether they can afford it or not, or — which is really the same — that driving by these people is so important for our society as a whole that we cannot let the market bar them from driving despite their accident proneness. If this were so, we would as a group, politically, make a decision for accidents — reversing the market pressure against them — by subsidizing the groups we wished to have drive *despite* their accident records. But in doing this we would also have to face the question of how many classes of people we wished to subsidize. We might conclude that though drivers 21–25 and 60–70 should be subsidized, driving by 18–21 year olds and those over 70 is not worth subsidizing. The importance of having them drive would not justify overruling the market discouragement to their driving that had resulted from their accident proneness.

[12] Presumably this is because we recognize that property ownership has some important noneconomic values which we want to protect. This does not mean, however, that we wish to make a taker who has an equivalent social utility (a "worthwhile" nuisance or the government in an eminent domain proceeding) pay for this noneconomic value.

[13] This is so unless, of course, leaving the burden of pain and suffering or other similar types of damages on the victim is expected to affect the victim's behavior and his activities in a "resource allocation sense."

[14] Calabresi, *supra* note 1.

[15] In practice, moreover, both the original political decision and the jury's *ad hoc* reexamination are made with the knowledge that compensation depends on the judgment. This probably tends to emphasize the question whether a real cost is involved. That is, it tends to dramatize the consequences of refusing to award a noneconomic cost, and therefore to make us think twice before we decide that a cost is not worth computing and entering into the relative price of activities.

[16] Technically, there would be a greater misallocation of resources if the cost were computed and included than if it were left out.

[17] This is just making the best of a bad situation. Failing to include these losses means that people will drive more than they should; failing to include uncomputable noneconomic benefits means they will drive less than they should. There is no assurance that the two will even out or, more important, that they will stand in the same relation to each other with respect to driving and with respect to other activities that compete with driving. But since computing them would, *ex hypothesi*, result in a greater bias than not computing them, this is the best we can do. We can then comfort ourselves in the knowledge that resource allocation even in theory is an exercise in doing the best possible and not in achieving perfection.

[18] This phrase for describing what I have been calling "resource allocation" or "general deterrence" was suggested by Professor Alfred Conard of the Michigan Law School.

[19] See Blum & Kalven, *Public Law Perspectives on a Private Law Problem — Auto Compensation Plans*, 31 U. CHI. L. REV. 641, 695–97 (1964).

[20] 109 Minn. 456, 124 N.W. 221 (1910).

[21] *Cf.* Blum & Kalven, *supra* note 19, at 696–97.

[22] It is interesting to speculate on the effect that unionization may have had on this "classic" example. It may well be that with the existence of highly organized unions, there would now be no difference in many industrial contexts if the worker initially bore the cost of industrial accidents instead of the employer. There might even be some situations, involving many small employers and one strong union, in which the best initial loss bearer would be the employee.

[23] Compare Blum & Kalven, *supra* note 19, at 697–98.

[24] In theory — the same theory, indeed, that suggests that it makes no difference which of two bargaining parties initially bears the loss — this would *always* happen. And this is one reason why it does not matter in theory who initially bears the loss.

In practice, of course, this will only happen in cases where there is a very important difference in the actual accident potential of users (assuming sellers are made to bear the initial loss). If it is cheaper for users to evaluate the different accident potential of sellers than for sellers to evaluate the user's accident potential, this might be a reason for placing the cost initially on the user rather than the seller. But it is a reason of the same order and type as those previously discussed reasons that determine which of two parties to a bargain we want to bear the loss initially. As such it must be considered together with them.

What cannot be done is what Blum and Kalven appear to do — ignore the other reasons because "in theory" they do not matter, and nevertheless place great weight on *this* single reason for choosing a loss bearer. See Blum & Kalven, *supra* note 19, at 696–98.

[25] This is in the broad sense defined above. See pp. 726–28 *supra.*

[26] Coase, *The Problem of Social Cost*, 3 J.L. & ECONOMICS 1 (1960).

[27] A difference in who is richer or poorer may, however, mean an undesirable compensation effect with concomitant secondary losses. Should this be so and should such secondary losses result in a desire to remove the cost from either party and pay it, for example, out of a general social insurance fund then a crucial and probably undesirable effect in terms of general cost deterrence is likely.

[28] It is not clear to me, however, despite the examples in the article by Professor Coase, *supra* note 26, at 5–8, that no difference will exist in the really long run. Let us assume, as I take it Coase does, perfect competition and also a liability system in which Coase's cows pay damages. Let us assume further that an equilibrium is arrived at, through bargaining, in which each cattle raiser keeps three cows and pays the neighboring farmer $4.00 to avoid the $6.00 crop loss Coase posits by planting a crop cows do not like and that the $4.00 bribe plus the market price of the new crop yields the farmer as much as the previous crop did. In a perfectly competitive world just enough cattle raisers and enough farmers will engage in each business at this equilibrium so that the marginal farmer and the marginal cattle raiser will each earn the same return on his investment — the same return in fact available in any other nonmonopolistic activity. Let us now alter the liability system: cows no longer pay for crop damage. It is true, as Coase suggests, that the cattle raiser will still keep his "optimal" three cows and the farmer will plant the same crop that cows do not like. Nothing has happened to change that. But now farmers who plant this crop are $4.00 poorer than they were previously and cattle raisers $4.00 richer. The rate of return on the investment of even the marginal cattle raisers will now be higher than in other industries, the rate of return of marginal farmers will be lower. Assuming, as Coase must in his perfect world, free entry and exit, people will move into cattle raising from neutral occupations, and people will leave farming to enter these same neutral occupations. A new equilibrium will be established, and perhaps each cattle raiser will still keep three cows and each farmer raise the same crops, but there will nevertheless be more three-cow cattle raisers, and hence more cows, and fewer farmers and fewer crops.

The short of the matter is, liability rules do affect the amount of money people make — in the short run; and in the long run people will enter those activities where they make more money. Thus, although each individual may, through bargaining, minimize the effect of a liability rule by paying the person he injured to do his best to avoid the injury, this can only reduce the misallocation effect of originally putting the loss on the wrong party. It cannot eliminate it. Mitigation is good enough for me and the analysis in this article; whether it suits Professor Coase as well, I do not know. See also note 30 *infra*.

[29] Coase, *supra* note 26, at 15.

[30] If in addition my doubts about the long-run situation are true, see note 28 *supra*, than all Coase proves is that no matter how we may misallocate resources in the first instance, the market will operate through artificial bargains to mitigate the effect of the misallocation but not to correct it altogether. The same would be true if we were dealing with costs that could not conceivably be taken to belong to the party originally burdened, as it would if the costs might seem properly to belong to that party. Thus, if for no good reason the government chose to put the cost of smoke pollution on television manufacturers, television manufacturers would bribe people to wear gas masks, or factories to reduce smoke, or both, to whatever degree would most cheaply reduce the cost. The resulting allocation would be better than if television manufacturers could do nothing to reduce the cost of smoke pollution. It would not, however, be as good an allocation as would have come about if the cost had been allocated originally to the factory or to the homeowner. For the result would be, despite the mitigation, that some marginal television producers would drop out, and fewer TV sets would be made than would optimally be desired. The same would be true if the cheapest way of avoiding smoke damage was by having factories install a smoke-clearing device, and the original cost of smoke pollution was put on neighboring homeowners. Once again the homeowners would bribe the factories to install the device and the loss would be mitigated — but some marginal homeowners would find the extra tax too much and would move in with their mothers-in-law. This too would not be the optimal arrangement.

[31] It is ironic that this seems to be the suggestion of as devoted a "free market" economist as Professor Coase, *supra* note 26, at 15–28. For (quite apart from the problem of accidents and like costs) the major reason for having the market usually decide how much of what we want produced and how, rather than deciding the matter "administratively" or "collectively," is the very same difficulty of deciding what combination of goods yields the highest value of production at the lowest cost. *Id.* at 40. So it seems strange to assume that in the case of accidents we can first decide how much of what activities we want and then arrange damage and cost allocations to bring this combination about.

[32] If subclassification is in fact too expensive, then social insurance paid out of general taxes is the best solution; for, as we have indicated before, social insurance places the cost on the category — living in a given country — of which all other classifications are subcategories. It seems unlikely, however, in view of insurance company actuarial practices, that no subclassification would be worthwhile.

[33] And this is so whatever the reason why "pedestrianism" is taken as fixed. For whether pedestrianism is fixed because there are no substitutes for it, or because we want it fixed for political or other nonmarket reasons, the situation remains the same. We do not care about comparing *its* costs with other things and we may as well get the best comparison possible between cars and planes. We should be careful, however, about what we mean by "fixed." "Fixed" implies the absence of possible significant changes in the manner in which an activity is carried on as well as the absence of realistic substitutes for the activity. Thus, if pedestrianism could be made significantly safer by having pedestrians carry a widget (a costly safety device), and if putting part or even all of pedestrian-car accident costs on pedestrians would lead to a cost pressure for widgets, we could by no means consider pedestrianism as "fixed."

[34] If the car driver were uninsured and judgment proof, of course, no general deterrent effect would be achieved by putting the cost on driving. Further, should such a driver hit a pedestrian who as a result goes on relief, at least part of the cost of the accident would be externalized from both driving and walking. It should not be surprising that precisely such situations give rise to demands for compulsory insurance.

[35] If pedestrians were perfectly aware of the risks involved in walking and carried no general accident insurance, then putting part of the cost of car-pedestrian accidents on them would be as effective as if "walking-accident" insurance actually existed. For then, the risk awareness would accomplish the same function as the "walking-accident" insurance premium would. But such an assumption is as unrealistic as the assumption discussed earlier, see pp. 727–28 *supra*, that industrial workers were individually as aware of the risks of industrial accidents before workmen's compensation was developed as their employers were after it was instituted. Indeed, those few pedestrians who might be aware of the risk would probably be those who are so conscious of all accident risks that they would carry general accident insurance. For them, however, as we have just seen, the cost would be made a general cost of living and not affect walking at all.

[36] Often the search for such limited comparisons results in putting the full costs on the newer of the activities that combine to cause the costs, and only shifting things around if, despite bearing these costs, the new activity gains some dominance. See, *e.g.*, Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

[37] This is especially true because when the aim is allocation of resources, too much exactness is both useless and self-defeating for more reasons than are worthwhile listing. A fair collection of them can be found in Calabresi, *supra* note 1, at 503–05, 507–14 & nn.17 & 41.

[38] N.Y. Times, June 2, 1964, p. 39, col. 2. *Compare id.*, June 3, 1964, p. 45, col. 1, *with id.*, June 5, 1964, p. 30, col. 5.

[39] Thus, a foolish society may feel there is special merit in having both large and small cars. The variety might seem to be a symbol of wealth which the society wished perpetuated. If this symbolic value were insufficiently appreciated by individual buyers, such a society might not want the added costs of diversity to be placed totally on either large or small cars. For that allocation might result in one type of car becoming dominant. In the extreme case, the foolish society might even remove all diversity costs from both. Of course, wiser reasons for collectively desiring certain diversity costs are not hard to think of.

[40] To say that large cars are "socially more expensive" than small cars means that they would be less desired at the price they would cost if they were the only kind of car and bore all their accident costs, than would small cars in a similar situation. Obviously, it is more than difficult to know whether this would be so. And, indeed, even to suggest it makes one subject to exactly the same comments made about Professor Coase in note 31 *supra*.

[41] "Involvement," however, since it divides the costs, is not as good as allocation to one of the parties on the basis of the factors previously discussed — if such allocation can be made. Assume, for example, that an accident involving two activities costs $80 each time it occurs; assume also that such an accident could always be avoided by either activity through the installation of a safety device costing $60 per accident prevented. An involvement test would charge each of the parties $40. At first glance neither activity would install the safety device. Either might do so, subsequently, as a result of "artificial bargaining." But if the cost of entering into an "artificial bargain" was more than $20, no such bargain could be struck and the accident would not be avoided even though if *either* party were originally charged with the full cost of the accident, the safety device would readily be installed, as it should be. Lest this horrible situation seem worse than it is, the exactly opposite conclusion would be reached if instead of the situation posited, we posit the case where the only way to avoid the accident is if both activities modify their behavior somewhat, for instance by each installing a $30 safety device.

Leaving aside these extremes, the examples suggest that there are situations where, on the whole, having one bearer of the whole loss is desirable. Usually there will be cases where, on the basis of the factors discussed before, we will deem one of the parties the best loss bearer. There will also be many cases where no such assessment can be made, but these will usually be cases where some accident-reducing action on the part of all the activities involved seems desirable. And in these cases the kind of division that involvement makes is probably the best available.

[42] This elimination of unimportant *sine qua non* causes is really no more than a somewhat generalized application of the criteria derived in our earlier discussion of "Where Certain Comparisons Are More Important Than Others," pp. 734-37 *supra*, to a multilateral situation. In our earlier discussion we used the criteria to identify the best cost bearer in an accident involving several potential joint causes. Here we use them for the easier task of excluding some potentially involved activities and leaving all those about which we feel sufficiently doubtful so that an "involvement" type of division seems desirable.

[43] I do not mean that such decisions should be made on a case-by-case basis. That question is entirely a matter of the costs involved. There might be some contexts in which a case-by-case determination of what activities are involved and what are not may be worth the extreme cost of such determinations. In other areas guidelines of general applicability as to involvement might do nearly as good a job of excluding irrelevant activities and the fact that they do it much more cheaply than the case-by-case approach would be conclusive.

[44] The words "typical" and "incidental" in themselves are meaningless; they are only meant to be suggestive of the discussion that preceded them.

[45] The importance of this trend can easily be exaggerated by looking at those areas of the economy where advertising plays its most significant role. There it is easy, though certainly not always correct, to assume that the choices made by individuals are irrational and, more important, that the individuals will all too soon regret having made them. But the area of final consumer choices, even if it were as irrational as we sometimes think, is only a small part of the picture. If we consider all the decisions at the production level which are made by individuals operating through the market mechanism, it is much easier to conclude that individual choosers can still do better for themselves than anyone else.

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